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Porter

Life Insurance Company's Messenger.

EXPECTATION OF LIFE.

The following is the Expectation of Life, according to the Carlisle Tables of Mortality.

Age.	Expectation in yrs. and months.	Age.	Expectation in yrs. and months.
..	38.72		
1	44.68	53	18.07
2	47.55	54	18.28
3	49.82	55	17.58
4	50.76	56	16.89
5	51.25	57	16.21
6	51.17	58	15.55
7	50.80	59	14.92
8	50.24	60	14.34
9	49.57	61	13.82
10	48.82	62	13.31
11	48.04	63	12.81
12	47.27	64	12.30
13	46.51	65	11.79
14	45.75	66	11.27
15	45.00	67	10.75
16	44.27	68	10.23
17	43.57	69	9.70
18	42.87	70	9.18
19	42.17	71	8.65
20	41.46	72	8.16
21	40.75	73	7.72
22	40.04	74	7.33
23	39.31	75	7.01
24	38.59	76	6.69
25	37.86	77	6.40
26	37.14	78	6.12
27	36.41	79	5.80
28	35.69	80	5.51
29	35.00	81	5.21
30	34.34	82	4.93
31	33.68	83	4.65
32	33.03	84	4.39
33	32.36	85	4.12
34	31.68	86	3.90
35	31.00	87	3.71
36	30.32	88	3.59
37	29.64	89	3.47
38	28.96	90	3.28
39	28.28	91	3.26
40	27.61	92	3.37
41	26.97	93	3.48
42	26.34	94	3.53
43	25.71	95	3.53
44	25.09	96	3.46
45	24.46	97	3.28
46	23.82	98	3.07
47	23.17	99	2.77
48	22.51	100	2.28
49	21.81	101	1.79
50	21.11	102	1.30
51	20.39	103	0.83
52	19.68	104	0.50

SCIENCE 156 YEARS AGO.

It is a singular matter of record that Mr. White, an English astronomer, calculated the return of a comet in 1712, which would appear on the 12th of the coming October, at 55 minutes past 5 o'clock in the morning; and he also predicted the final destruction of our earth on the following Friday.

All classes were immensely excited by such melancholy intelligence. Boats and barges were secured wherever attainable in London, on the presumption there was a better chance for prolonging life a little longer on water than on land. South Sea stock fell to five per cent and India to eleven. As though the people were striving to make themselves ridiculous, a captain of a Dutch ship lying in the Thames, threw all his powder overboard.

At the expected moment, the comet appeared. This confirmed the rushing multitudes that the day of judgment had actually arrived. One hundred and twenty clergymen were ferried to Lambeth in order to petition for an appropriate prayer, as none had been provided for the solemn occasion in the church service. Three maids of honor to the Queen burned their libraries and purchased Bibles with all imaginable haste. Bishop Taylor's work on *Holy Living and Dying* was in demand.

In the mean while, there was a run upon the Bank of England, requiring the attendance of all the officials to pay out specie. On Thursday seven thousand marriages were solemnized of persons illicitly living together. Finally, to crown the extraordinary farce, the result of superstitious ignorance, Sir Gilbert Heathcote, first director of the bank, issued orders to all the fire companies of London, requiring them to keep a good lookout, and have a particular eye to the Bank of England when the globe took fire.



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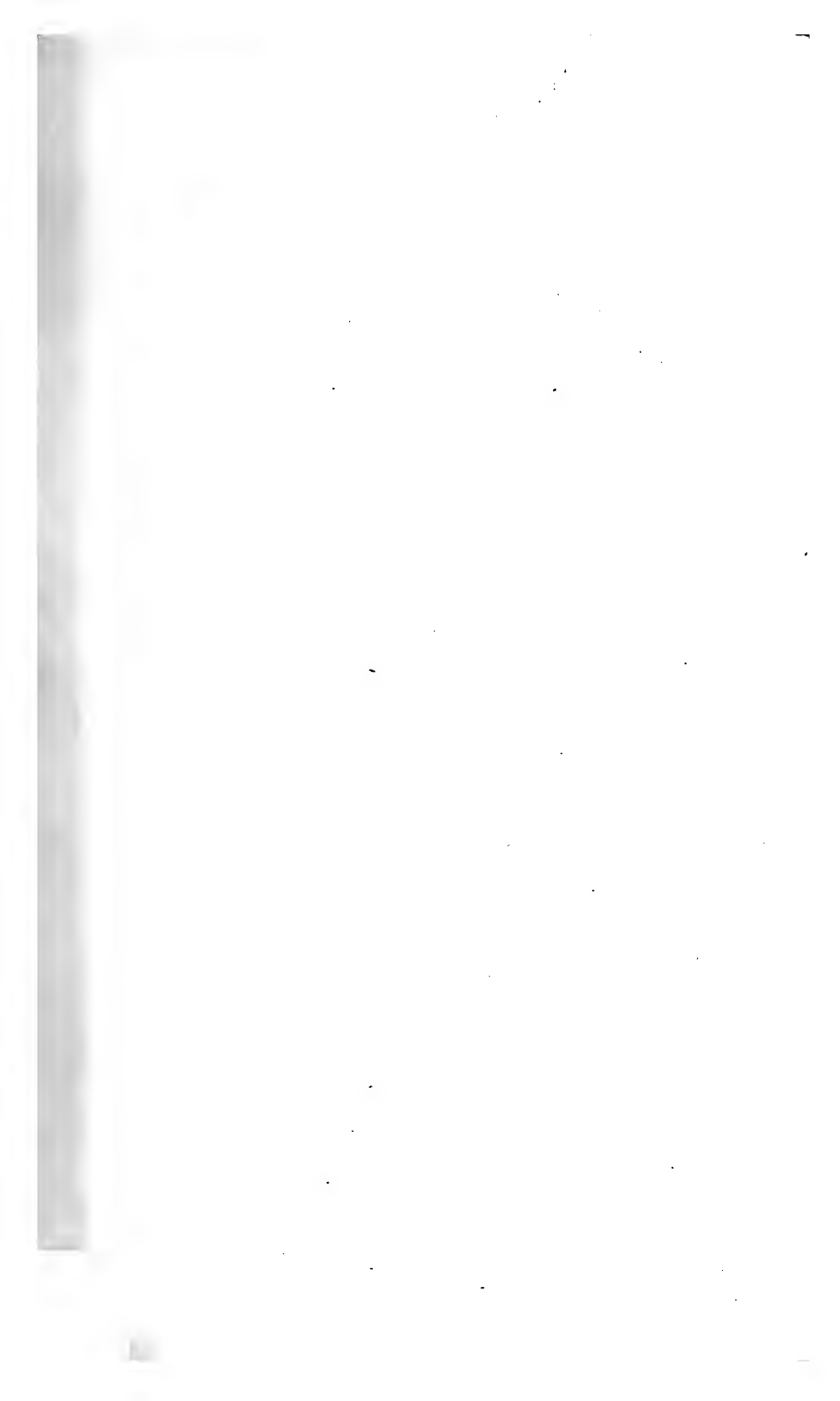


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THE OFFICE OF SURROGATE,
SURROGATES,
AND
SURROGATES' COURTS,
AND
EXECUTORS, ADMINISTRATORS, AND GUARDIANS,
IN THE STATE OF NEW YORK.

A COMPILATION OF THE STATUTES,
AND
A Summary of the Judicial Decisions of the State of New York,
RELATING TO THE
OFFICE OF SURROGATE, THE PROVING OF WILLS, THE GRANTING OF PROBATE, OF LETTERS
TESTAMENTARY, OF ADMINISTRATION AND OF GUARDIANSHIP, AND THE POWERS,
DUTIES, AND LIABILITIES OF EXECUTORS, ADMINISTRATORS,
AND GUARDIANS,
ARRANGED IN THE FORM OF A TREATISE.

By ISAAC DAYTON.

WITH
AN APPENDIX,
CONTAINING FORMS AND PRECEDENTS FOR PRACTICE IN THE SURROGATES' COURTS, AND FOR
THE USE OF EXECUTORS, ADMINISTRATORS AND GUARDIANS.

NEW YORK:
BANKS, GOULD & CO., 144 NASSAU STREET.
ALBANY:
GOULD, BANKS & CO., 475 BROADWAY.

1855

Entered, according to the Act of Congress, in the year one thousand eight hundred and forty-six, by

ISAAC DAYTON,

in the office of the Clerk of the District Court of the United States for the Southern District of New York.

Entered, according to act of Congress, in the year one thousand eight hundred and fifty-five,

By ISAAC DAYTON,

in the office of the Clerk of the District Court of the United States for the Southern District of New York.

INTRODUCTION.

THE First Edition of the following work having been for some two or three years out of print, at the solicitation of the publishers, as well as of many members of the profession, the writer has prepared this Second Edition for publication.

The Book is intended to be a guide to the practice of the Surrogate's Courts of this State, and an assistant to Executors, Administrators and Guardians, in discharging the duties of their trusts. It consists, as its title indicates, of a collection of the Statutes, and a summary of the judicial decisions of the State of New York, relating to Surrogates, Executors, Administrators and Guardians. The whole is arranged in the form of a treatise, and in this Edition, as in the former, the standard elementary authors have been freely quoted, for the purpose of applying, explaining, or elucidating the Statutes or decisions which have been mentioned. The elegant, learned and comprehensive treatise of Sir Edward V. Williams on the law of Executors and Administrators, and the valuable notes to the American Edition of that treatise, have contributed important aid in this particular. Assistance, also, in the same particular, as well as in forming the general plan, and arranging and discussing the subjects of the work, has been derived from Mr. Kirtland's able and useful treatise on the Practice in Surrogates' Courts.

The forms to be found in the Appendix are, for the most part, the same as those which accompanied the First Edition, and such as are in daily use in the Court of the Surrogate of the county of New York.

The writer has had reason to believe that the previous Edition of this work has proved of service. He has, in this Edition, endeavored to add to the value and usefulness of the publication. With a grate-

ful sense of the indulgence which was extended to the First Edition, he again submits the work to the profession and the public, with pretensions to no other merit than that of faithfully and earnestly attempting to render a useful service to the practitioner, in conducting business in the Surrogates' Courts, and to guide and assist executors, administrators and guardians in the proper and safe management of estates committed to their charge.

New York, 1st August, 1855.

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APPENDIX OF FORMS.

N O T E .

The reader will please notice that, in quoting the Statutes, the sections have been taken from, and numbered according to, the Second Edition of the Revised Statutes, and the Session Laws since the publication of that edition. The paging of the First Edition of the Revised Statutes, being the marginal paging of all the subsequent editions, has been followed, and will, in most cases, be found stated in the Notes. The paging of the Fourth Edition will generally be found stated in connection with that of the First Edition. And such statutes as have been incorporated into the Revised Statutes since the publication of the Second Edition, are referred to as printed in the Fourth Edition of the Revised Statutes, as well as by the pages at which they are to be found in the Session Laws.

The reader will also make the following corrections:

At page 95, commence a new paragraph with the word "It," in the 22d line.

At page 126, read, as all one sentence, from the word "Assuming," in the 25th line, to the word "Statute," in the 33d line, both inclusive. There should not be more than a semicolon after the word "validity."

At page 167, the second word of the seventeenth line should be "resisting," instead of "resting."

At page 248, line 9, read "sperate," instead of "separate."

At page 402, reference in note (v) should be *ante*, p. 123, instead of 323.

The reader's attention may also properly be directed to the following particulars respecting some of the points of law stated, and decisions quoted or referred to, in the course of this Work:

The judgment of the Supreme Court in *Seaman v. Duryea*, (10 Barb. S. C. R. 524,) referred to at pages 7, 20, 22, 23, 31, 632, 640, has been affirmed by the Court of Appeals, and is reported on appeal in 1 Kernan, at page 324.

By Statute 15 & 16 Vict., c. 24, passed 17th June, 1852, "Wills Act—Amendment Act," 1852, Law Journal, (N. S.,) Vol. 21, Part III, Abridgment of Statutes, p. 14, a legislative construction has been put upon the provision of the Act 1 Vict., c. 26, requiring a will to be signed at the foot or end thereof. The corresponding provision of the Statute of this State, will be found considered at page 62 *et seq.* of this work. The English decisions referred to, and quoted so far as they bear upon the construction of the Statute of this State, have the same application since the Amendment Act as before; but the fact that such an act has been passed, may properly be noted.

In the case of *Whitbeck v. Patterson*, (10 Barb. S. C. R. 608,) referred to, and quoted at pages 75-77, the judgment of the Supreme Court, reversing a sentence of the surrogate of the county of Monroe refusing to admit a will to probate, has been reversed by the Court of Appeals, and, as is understood, an issue has been awarded.

The judgment of the Supreme Court in *Hubbard v. Hubbard*, (12 Barb. S. C. R. 148,) affirm-

ing a sentence of the surrogate of the county of Suffolk, admitting to probate a nuncupative will, referred to at pages 121 and 185, has been affirmed by the Court of Appeals. See 4 Selden, 196.

In the case of *Boyd v. Davis*, not yet reported, the Supreme Court, at General Term, in the Third District, on an appeal from a sentence of the surrogate of the county of Albany, affirmed the sentence of the surrogate, and expressly determined that where a sole executor renounces, or all of several executors renounce, and administration with the will annexed is issued, the renunciation is peremptory, and cannot be retracted; and the executor or executors named in the will cannot, after the death or removal of the administrator with the will annexed, retract his or their renunciation, and become entitled to letters testamentary of the will. This is at variance with the views of the Chancellor expressed in *Robertson v. McGeech*, (11 Paige, 640,) quoted in this work at pages 203, 204.

In *Sheldon against Bliss*, (4 Selden, 31,) Mr. Justice Willard, in a written opinion, held that the discretion given to the appraisers, with reference to the property, not exceeding in value \$150, to be set apart, on taking an inventory, for the use of the widow and minor child or children of the deceased, by the statute of 1842, has reference mainly to the articles to be inventoried and set apart for the widow, and can never be referable to the amount, when the personal property left by the deceased exceeds in value one hundred and fifty dollars. This subject is considered at pages 249-251 of this volume.

The case of *Williams against Williams*, referred to and quoted at considerable length at pages 364-71, is reported in 4th Selden, at page 525.

The case of *Westervelt against Gregg*, in the Court of Appeals, referred to in note (g), page 541, is reported in 2 Kernan, at page 202.

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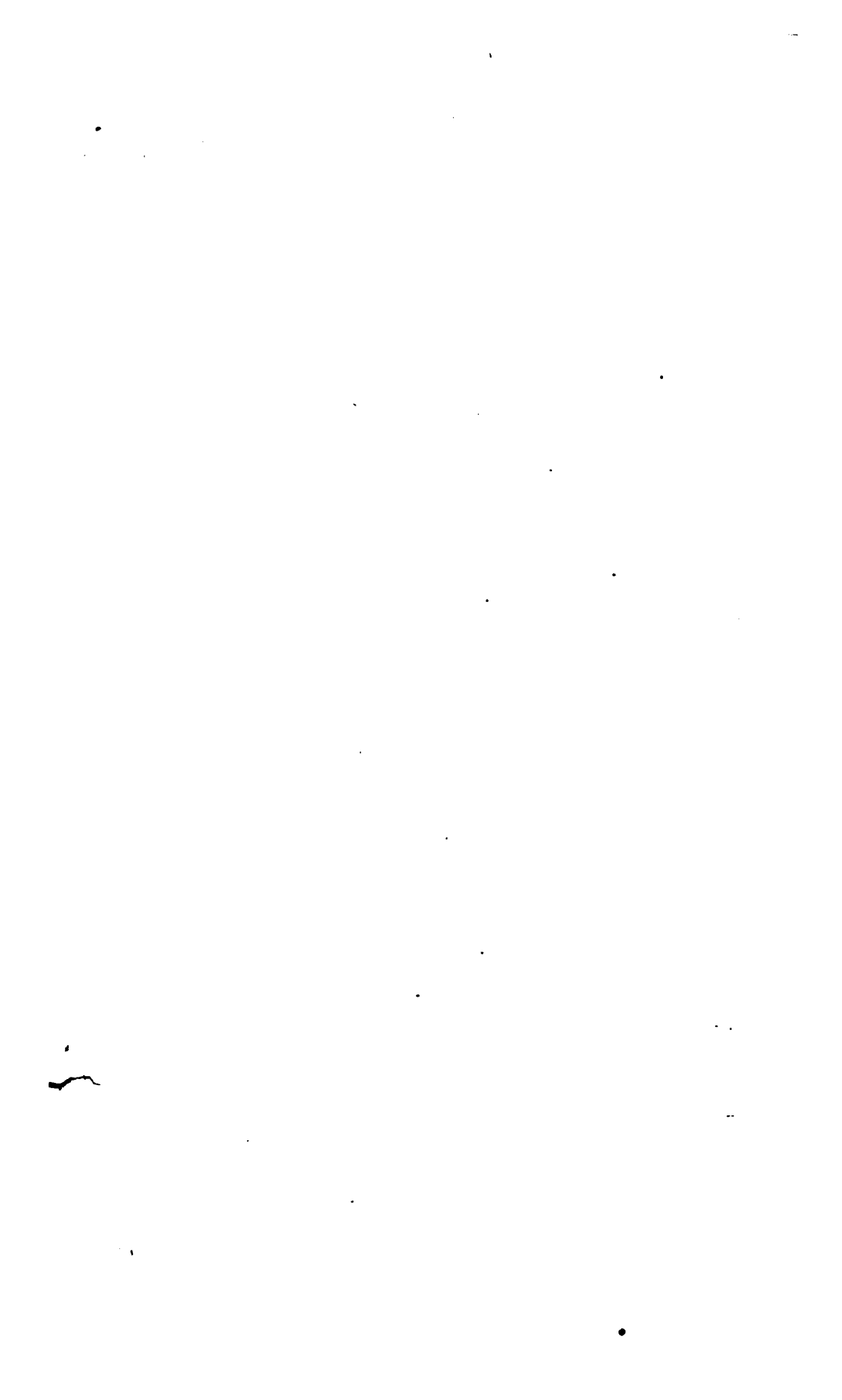
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SURROGATES

AND

SURROGATES' COURTS,

AND

Executors, Administrators and Guardians,

IN THE STATE OF NEW YORK.

CHAPTER I.

OF THE JURISDICTION, POWERS, DUTIES AND LIABILITIES OF SURROGATES.

Of the Origin of the Office.

THE office of surrogate in this state is in many respects similar to, and perhaps was derived from, the metropolitan and diocesan jurisdictions of England, exercising authority over the estates and effects of deceased persons.

By the old law of England, the king, as the *parens patriæ* and general trustee of the kingdom, was entitled to seize upon the goods of such persons as died intestate, to the intent that they should be preserved and disposed of for the burial of the deceased, the payment of his debts; to advance his wife and children, if he had any, and, if not, those of his blood.(a)

This prerogative the king exercised for some time by his own ministers of justice, and it was granted as a franchise to many lords of manors and others, who have to this day a prescriptive right in these matters;(b) and afterwards, the crown, in favor of the church, invested the prelates with this branch of the prerogative; which was done, saith Perkins,(c) because it was intended by the law that spiritual men are of

(a) 2 Black. Comm. 494; 9 Co. 38 b; Ib. 376; Toller on Executors, 80; Williams on Executors, 329.

(b) To this day, about eighty of the testamentary courts in England are *lay* courts, the franchise being attached to corporations, manors, forests, universities and hospitals; and most of them are held by prescription, and are of indefinite antiquity, or of Saxon origin. Fourth Report of Commissioners on the Law of Real Property, pp. 50, 51, 107; 1 Bradf. Surr. Rep. xix.

(c) 9 Rep. 38

better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The effects were therefore committed to the ordinary, and he might seize and keep them without wasting, and after the *partes rationabiles*, or two-thirds belonging to the wife and children were deducted, might give, alien or sell the remainder at his pleasure, and dispose of the money in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious. If he did otherwise, he violated the trust reposed in him as the king's almoner within his diocese. And as the ordinary had thus the disposition of intestate's effects, the probate of wills of course followed; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the functionary, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.(d)

The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were, therefore, not accountable to any but to God and themselves for their conduct. But the conduct of the ordinary did not justify the presumption which had been thus formed in his favor. The trust so confided to him he did not very faithfully execute. He converted to his own use, under the name of church and poor, the whole of such residue, without even paying the deceased's debts. To redress such palpable injustice, the Statute of Westminster 2, or the 13 E. I, ch. 19, was passed; by which it is enacted, that the ordinary is bound to pay the debts of the intestate, so far as his goods will extend, in the same manner as executors are bound, in case the deceased has left a will: an use, as Mr. Justice Blackstone styled it, more truly pious than any requiem or mass for his soul.(e) This, however, it has been said, was the law at common law, and that the Statute of Westminster 2 was made in affirmance of the common law.(f)

(d) 2 Black. Comm. 494; Toller on Executors, 80. This is the history of this jurisdiction, as given in the authorities quoted. The reader is referred, however, upon this subject, to the learned and interesting dissertation on "the origin of the ecclesiastical jurisdiction over the probate of wills, and the administration of the estates of deceased persons, as connected with the prevalence of the rules and principles of the civil law in this department of jurisprudence," contained in the introductory note to the first volume of Bradford's Surrogate's Court Reports. From this, it will appear that the jurisdiction of the ordinary was acquired in the reverse order to that above stated. That under the Anglo-Saxons, the probate of wills was exclusively the subject of the jurisdiction of the ordinary courts, or of those public assemblies which, by the custom of the age, possessed judicial powers; that the clergy probably, first, for purposes of convenience and assistance in expounding the laws; and, afterwards, by custom and royal warrant, became presiding judges with the civil magistrate, in the most important courts, and that these courts continued after the conquest, and exercised their customary jurisdiction, without any perceptible change, until about the eighteenth year of William the Conqueror, when he separated the ecclesiastical from the secular jurisdiction: that, although the church did not possess probate jurisdiction, either by the civil or the canon law, approaches were made towards the acquisition of this authority at a very early period: that, in the Saxon county courts, the peculiar cognizance of wills would naturally tend rather to the charge of the bishop, than of the earl, and when, by the direction of William, the bishop ceased to sit with the earl, and was authorized to hold his own court at such place as he might designate, he took with him the probate jurisdiction: and that, the charge of the proof of wills, and the execution of legacies, being then in the bishop or ordinary, the administration of the estate of an intestate, in progress of time, flowed into the same channel.

(e) Toller on Executors, 80.

(f) 5 Rep. 82 b; 9 Rep. 39 b. See Williams on Executors, 330-1.

But though the ordinary was, either at common law, or now by force of this statute, liable to the intestate's creditors, yet the residue, after payment of debts, continued in his hands, to be applied to whatever purposes his conscience might approve. But as he was not sufficiently scrupulous to prevent the perpetual misapplication of the fund, the legislature again interposed, in order to divest him and his dependents of the administration. The statute 31 E. III, ch. 11, therefore provides, that in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods, and they are thereby put on the same footing, in regard to suits, and to accounting, as executors appointed by will.^(g)

This is the original of administrators, as they at present stand in England.^(h) The vestiges of the old authority still linger in the forms in use in the ecclesiastical courts of England, and they have been followed in the Surrogates' Courts of this state.

In our American law, we have assigned these as well as other secular matters, to the courts and magistrates of civil jurisdiction.⁽ⁱ⁾

Before the revolution, the power of granting letters testamentary and letters of administration, and perhaps other powers, vested in England in the ecclesiastical courts, resided in New York in the colonial governor, as judge of the Prerogative Court or Court of Probates of the colony.^(j) The probate of last wills and testaments, and granting of administration of intestates' estates, were declared, by an act of the general assembly of the colony, of the 11th Nov. 1692, to be vested in the governor, "or in such persons as he should delegate under the seal of the prerogative court."^(k) This right continued down to the revolution. By the "act to organize the government of this state," passed 16th March, 1778, the court of probates was instituted, and surrogates were first recognized under the state government.^(l) Before that time the governor of the colony delegated persons in the different counties with similar powers.^(m)

The session laws and the various revisions previous to the Revised Statutes, contain numerous enactments respecting this officer. By an act of the 5th of April, 1802, surrogates were authorized to allow of guardians who should be chosen by infants of the age of fourteen years, and to appoint guardians for such as should be within that age,

(g) Toller on Executors, 81; 2 Black. Comm. 495-6; 1 Williams on Executors, 331.

(h) Toller on Executors, 81; 1 Williams on Executors, 331. By Statute 21 Henry VIII, ch. 5, the ordinary is given a discretion to grant administration either to the widow, or the next of kin, or to both of them; and, where two or more persons applying are in the same degree of kindred, he has his election to accept whichever he pleases. The Statute of Distributions (22 & 23 Car. II, ch. 10; 29 Car. II, ch. 30.) destroyed the old common law right to the *pars rationabilis*, and made the estate distributable among the widow and next of kin—leaving still, however, in the hands of the administrator, for his own use, the third formerly retained by the church; and, finally, the Statute of 1 Jac. II, ch. 17, made this third the subject of the Statute of Distributions. "Thus, after the lapse of many years," says Mr. Surrogate Bradford, "the restitution of the estate to the use of the family of the deceased, and its administration under certain prescribed rules was effected, and nothing was left to the spiritual courts save the judicial cognizance of this class of cases." 1 Brad. Rep. Intr. note, p. xxvi.

(i) 2 Kent's Comm. 409.

(j) 2 Kent's Comm. 409; 3 R. and or. S. (2d ed. R. S.) App. 679.

(k) Bradford's Col. Laws, 16.

(l) Vide Gr. v. 1, 18, sec. 3.

(m) 1 R. L. 1813, 454, note.

in as full and ample manner as the Chancellor of this state might or could appoint or allow of the same. They have been authorized, also, by statute, to cause the admeasurement of dower to widows. By the act of the legislature of 21st March, 1823, the Court of Probates was abolished, and all its writings, records and proceedings, were ordered to be deposited in the office of the secretary of this state.⁽ⁿ⁾

Of the former General Powers and Jurisdiction of Surrogates.

It is not within the scope of this work to discuss any of the questions which formerly existed as to the powers and jurisdiction of surrogates in this state. Before the adoption of the Revised Statutes, their jurisdiction was very undefined; the laws respecting them, and the subjects of their cognizance, were defective, ambiguous and irreconcilable, and the practice and decisions were various and floating. The Revised Statutes provided for the future an effectual remedy for these evils, by accurately and strictly defining the purposes and ends of the office, the objects and extent of its authority, the means of exercising and enforcing such authority, and the duties and responsibilities of the officer.

Of their Incidental and Constructive Authority.

The first section of the title of the Revised Statutes relative to Surrogates' Courts, as originally reported by the revisers, and enacted by the legislature, after enumerating the powers of the surrogate as herein-after given, concluded as follows:

"Which powers shall be exercised in the cases, and in the manner prescribed by the statutes of this state, and in no other; and no surrogate shall, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this state."^(o) Whether or not it was found that the limited and precise terms of the Revised Statutes were not adapted to the nature of the proceedings, or adequate to the business of the Surrogates' Courts, at any rate by the 71st section of the act of the 16th May, 1837,^(p) so much of this provision as is above printed in *italics* was repealed. After the Revised Statutes, "it was found," says Chancellor Walworth,^(q) "that the exercise of certain incidental powers by courts, was absolutely essential to the due administration of justice; and that the revisers and the legislature had not, by their care and foresight, been able to take the case of these Surrogates' Courts out of the operation of the general rule." And it has been also remarked that the entire course of legislation since the adoption of the Revised Statutes has looked rather to an enlargement than a diminution of the authority of the surrogate.^(r)

The vigor and extent of their incidental and constructive authority, since the repeal of the restrictive clause in the Revised Statutes, have

⁽ⁿ⁾ S. L. 1823, 62.

^(p) S. L. 1837, 536.

^(r) *Isham v. Gibbons*, 1 Bradf. Surr. Rep. 78.

^(o) 2 R. S. (1st ed.) 221.

^(q) In *Pew v. Hastings*, 1 Barb. Ch. Rep. 454.

been adverted to in several reported cases, and the exercise of powers not enumerated in the statute has been repeatedly sustained and commended by the Appellate Court. In *Vreedenburg v. Calf*,^(s) it was held that since the repeal of the prohibitory provision of the Revised Statutes, where an order has been entered when the surrogate had not the power to enter such an order, he not only has the right, but it is his duty, to set it aside for irregularity. In *Skidmore v. Davies*^(t) it was expressly stated that the remedy of a party aggrieved by an irregular *ex parte* order made by a surrogate, is to apply to the surrogate to vacate or set aside the order, and not by an appeal. And where a default has been regularly taken in the Surrogate's Court against a party by mistake of the party or by accident, it is settled that the surrogate has the power to open the decree taken by such default, and set the same aside upon a proper application for that purpose, showing such mistake or accident.^(u) And if an order is actually made by the surrogate at a particular time, and he was then authorized to make such an order, he probably has the right afterwards to enter it *nunc pro tunc*, as of that date, if by any inadvertence it was not entered in the books of his office at the time it was made.^(v) The effect of the amendment of 1837, however, it seems, was only to restore to the surrogates the powers which were incidental and necessary to the proper discharge of the powers conferred upon them by statute or otherwise. The section as now amended, (presently to be given at length,) therefore, gives to the surrogates substantially the same powers as they possessed previous to the adoption of the Revised Statutes.^(w)

In *Isham v. Gibbons*,^(x) before the surrogate of the county of New York, it was intimated on this subject that the surrogate has a right to receive a foreign probate in evidence where the deceased was domiciled abroad, independently of the statutory declarations. Although the statute does not contain any provision expressly conferring the authority, it was considered in the case of the last will and testament of Catharine Kerr, deceased, before the surrogate of the county of New York, that the surrogate has jurisdiction, where one will has been already admitted to probate, to take the proof of a subsequent will and to call in the previous probate, that this power is essential to the administration of justice, and a necessary incident to the exclusive jurisdiction of the surrogate over the subject matter of the probate of wills.^(y) And that the power to take the proof of wills being given generally, the mode of its exercise in a case not provided for by statute, must be regulated by the court in the exercise of a sound discretion, according to the peculiar circumstances of each particular case. "For example," it was said, "there can be no doubt that a legatee or party interested in a later will, discovered after a previous will has been admitted to proof, has a right to have the last will proved and letters testamentary issued thereon; but there cannot be two last wills and two sets of letters at the same time.

(s) 9 Paige, 128.

(t) 10 Paige, 316. See also *Proctor v. Wanmaker*, 1 Barbour's Chan. Rep. 302.

(u) *Pew v. Hastings*, 1 Barb. Ch. Rep. 452; *Harrison v. McMahon*, 1 Bradf. Surr. Rep. 283.

(v) *Butler v. Emmett*, 8 Paige, 12, 21.

(w) *In the Matter of Parker*, 1 Barb. Ch. Rep. 154.

(x) 1 Bradf. Rep. 69.

(y) See 2 R. S. 229; 4th ed. 418. •

It is incidental, therefore, to the exercise of jurisdiction in taking probate of the last will and the consequent grant of letters, to revoke the first probate and the first letters testamentary." And in *Kohler v. Knapp*,^(z) it was held that, by the repeal, by the act of 1837, of the above mentioned limitation provided by the Revised Statutes, the original jurisdiction of the surrogate in relation to the grant of administration, was placed where it had been previously to the Revised Statutes, except so far as it was regulated expressly by statute. And it was declared that although the surrogate must in every enumerated case exercise his powers "in the cases and in the manner prescribed by the statutes of this state," yet in a *casus omisus* he should not decline jurisdiction because the law is silent as to the mode in which it is to be exercised, when it is apparent that a proper occasion to invoke his authority has arisen.^(a)

Surrogates' Courts—Statutory Courts.

Surrogates' Courts are not, by the Revised Statutes, courts of record, but are named therein among the "courts of peculiar and special jurisdiction."^(b) "The Surrogates' Courts" are included in the enumeration of the courts of justice of this state, contained in sec. 9, title 1, of the Code of Procedure.

It was laid down previous to the enactment of the Code of Procedure, that the Surrogate's Court is entirely a creature of the statute, and that in pleading its decree it should be shown affirmatively, therefore, that the facts upon which it acted gave jurisdiction of the subject matter and of the persons.^(c) By the Code,^(d) however, it is provided that in pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction. Formerly, in all the cases relating to surrogates' sales of real estate, it was held that the person claiming under them must show affirmatively that the officer had acquired jurisdiction.^(e) But now, by statute of March 23, 1850,^(f) every sale heretofore made or hereafter to be made under any of the provisions of the title of the Revised Statutes concerning the powers and duties of executors and administrators, in relation to the sale and disposition of the real estate of their

(z) 1 Bradf. Rep. 241.

(a) See also *Bliss v. Sheldon*, 7 Barb. Sup. Ct. Rep. 152. Independently of the statute of 1837, a surrogate has power to call in and revoke letters of administration, which have been irregularly and improperly obtained upon a false suggestion of a matter of fact, and without due notice to the party rightfully entitled to administration. *Proctor v. Wanmaker*, 1 Barb. Ch. Rep. 302.

(b) 2 R. S. 220, 276; 4th ed. 417.

(c) *Dakin v. Hudson*, 6 Cow. 221; *Corwin v. Merritt*, 3 Barb. Sup. Ct. Rep. 341. See, also, *The People v. Barnes*, 12 Wend. 492.

(d) Code of Procedure, as amended July, 1851, sec. 161; Code of 1848, sec. 138: 1849, 1851, sec. 161.

(e) *Bloom v. Burdick*, 1 Hill, 130, 139; *Corwin v. Merritt*, 3 Barb. Sup. Ct. Rep. 341.

(f) S. L. 1850, 117; 2 R. S. (4th ed.) 290.

testator or intestate(*g*) and of the acts amending the same or in addition thereto, shall be deemed and held to be as valid and effectual as if made by order of a court having original general jurisdiction; and the title of any purchaser at any such sale, made in good faith, shall not be impeached or invalidated by reason of any omission, error, defect or irregularity in the proceedings before the surrogate, or by an allegation of want of jurisdiction on the part of such surrogate; except in the manner and for the causes that the same could be impeached or invalidated, in case such sale had been made pursuant to the order of a court of original general jurisdiction.

The Surrogate's Court, has however, only a special and limited statutory jurisdiction, and in general its proceedings can be sustained only by showing a conformity to the statute.^(h) The authority to do certain acts, or to exert a certain degree of power, however, need not be given in express words. If the authority may be fairly and reasonably inferred from the general language of the statute, or if it be necessary to accomplish its objects, and to the just and useful exercise of the powers which are expressly given, it may be taken as granted.⁽ⁱ⁾ And in matters and proceedings coming within the cognizance and jurisdiction of the surrogate, his decree is conclusive and cannot in general be impeached in a collateral proceeding.^(j) If the surrogate obtain jurisdiction, subsequent error or irregularity of the proceedings before him cannot be shown in a collateral action,^(k) nor can his decree be impeached even for fraud,^(l) nor even although it appear that there has been in the proceedings before him a palpable disregard of the directions of the statute applicable to the matter before him.^(m) Where, however, the surrogate has not jurisdiction of the subject matter of the suit or proceeding before him, no assent or submission of the parties can give him such jurisdiction.⁽ⁿ⁾

Of Pleadings in Surrogates' Courts.

There is not any statute or rule regulating pleadings in the Surrogate's Court, but it is laid down that in this, as well as in other courts, the parties ought to make statements of their claims in the nature of pleadings, in order that the parties may be apprised of the questions in issue.^(o)

(*g*) Title 4, chap. 6, part 2, 2 R. S. 99; 4th ed. 284.

(*h*) *The People v. Corlies*, 1 Sandf. Sup. Ct. Rep. 228; *The People v. Barnes*, 12 Wend. 492; *Wilson v. The Baptist Education Society*, 10 Barb. Sup. Ct. Rep. 308; *Seaman v. Duryea*, 10 Ib. 523.

(*i*) *Seaman v. Duryea*, 10 Barb. Sup. Ct. Rep. 523; per Brown, J.

(*j*) *Atkins v. Kinnau*, 20 Wend. 241; *Jackson v. Crawford*, 12 Wend. 533; *Jackson v. Robinson*, 4 Wend. 436; *Vanderpoel v. Van Valkenburgh*, 2 Selden, 190; *Farrington v. King*, 1 Bradf. Surr. Rep. 182.

(*k*) *Jackson v. Robinson*, 4 Wend. 436.

(*l*) See *Atkins v. Kinnau*, 20 Wend. 246.

(*m*) *Vanderpoel v. Van Valkenburgh*, 2 Selden, 190.

(*n*) *Dakin v. Deming*, 6 Paige, 95.

(*o*) *Van Vleck v. Burroughs*, (per Parker, J.,) 6 Barb. Sup. Ct. Rep. 344. See, also, *Foster v. Wilbur*, 1 Paige, 540.

Of Attorneys and Counsellors in the Surrogates' Courts.

Attorneys are not known as officers of the Surrogate's Court; and the person appearing as attorney there, is not considered as an attorney on record, upon whom notices may be served, in the progress of a suit, prosecuted or defended by attorney. (p) The 75th section of the act known as the judiciary act, passed 12th May, 1847, authorizes solicitors in Chancery and attorneys of the Supreme Court, admitted previously to the first Monday of July, 1847, to practice in all the courts of this state; attorneys of the Court of Common Pleas of any county, admitted previously to the same day, to practice in the county court of the same county; and attorneys admitted by the Supreme Court, to practice in all the courts in this state. This, however, probably has not had the effect to make such attorneys officers of the Surrogates' Courts. They represent the persons for whom they appear before the surrogate, only in the same manner as they represent their clients in the justices' courts.

Of the Existing Organization of Surrogates' Courts.

The office of surrogate and Surrogates' Courts, as they at present exist in this state, are established by the following provisions of the constitution of the state:

ARTICLE VI.

Section 14. There shall be elected in each of the counties of this state, except the city and county of New York, one county judge, who shall hold his office for four years. He shall hold the county court, and perform the duties of the office of surrogate.

In counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer, to perform the duties of the office of surrogate.

Section 15. The legislature may, on application of the Board of Supervisors, provide for the election of local officers, not to exceed two in any county, to discharge the duties of county judge and of surrogate, in cases of their inability or of a vacancy, and to exercise such other powers in special cases as may be provided by law.

By the twelfth section of the fourteenth article of the constitution, it was provided that the Surrogate's Court of the county of New York, should remain, until otherwise directed by the legislature, with its then existing powers and jurisdiction.

By the eleventh section of article 6 of the constitution, all judicial officers except justices of the Supreme court, and judges of the Court of Appeals, and except justices of the peace, and judges and justices of inferior courts, not of record, may be removed by the senate on the recommendation of the governor; but no removal can be made by virtue of this section, unless the cause thereof be entered on the journals, nor unless the party complained of shall have been served with a copy of the complaint against him, and shall have had an opportunity of being heard in his defence: on the question of removal, the ayes and noes to be entered on the journals.

(p) *Coates v. Cheever*, 1 Cowen, 463, 475.

Of the Election of County Judges, and separate Officers to perform the Duties of the Office of Surrogate.

Under the above clauses, requiring the election of county judges, and authorizing the legislature to provide for the election, in counties having a population exceeding forty thousand, of a separate officer to perform the duties of the office of surrogate, it was enacted on the twelfth day of May, 1847, by the "act to provide for the election of certain judicial and other officers, and to fix their terms of office," that the first election of the county judges, in the respective counties, (the city and county of New York excepted,) and all other judicial officers whose election should be thereby provided for, should be elected* on Monday, the seventh day of June, then next.(g) And by the second section of the same act, it was enacted that there should be elected a separate officer to perform the duties of the office of surrogate, in each of the counties of this state, (except New York,) having a population exceeding forty thousand, in which such separate officer should be determined upon as provided by certain subsequent sections of the act.

The following three sections contain those provisions:

Sec. 8. In all cases where any county in this state, (except the city and county of New York,) shall have a population exceeding forty thousand, the Board of Supervisors therein, at any meeting of such Board, may, by a resolution thereof, provide for the election of an officer other than the county judge, who shall perform the duties of the office of surrogate therein.(r)

Sec. 9. Such resolution shall be immediately delivered by the clerk of the Board of Supervisors to the county clerk, whose duty it shall be to file the same in the office of the clerk of such county, and keep the same as a part of the records thereof.

Sec. 10. Within ten days after such resolution shall be filed in the office of any such county clerk, he shall transmit to the secretary of state, to be filed and kept in his office, a copy of such resolution duly certified by him.(s)

* Thus, in the original, providing that an election should be elected.

(g) S. L. 1847, 306.

(r) 1 R. S. (4th ed.) 313, sec. 12.

(s) S. L. 1847, chap. 276, p. 307. This section of the statute has been entirely disregarded. The following reply has been received from the office of the Secretary of State, to an inquiry respecting the copies of the resolutions of the Boards of Supervisors which the section requires to be filed:

STATE OF NEW YORK.

SECRETARY'S OFFICE,
ALBANY, October 12th, 1854. }

Gentlemen:—No certificates of the passage of the resolutions contemplated by sec. 8, chap. 276, Laws of 1847, have ever been filed in this office. By whose neglect the omission has happened, I am unable to say.

Respectfully,

A. G. JOHNSON, *Dep. Sec. of State.*

Messrs. JORDAN & DAYTON, No. 61 Chambers St., New York.

In all probability, the resolutions of the Boards of Supervisors have never been delivered to the respective county clerks, pursuant to the 9th section of the act; so that, in the several counties having a population exceeding 40,000, in which a surrogate has been provided for under the act of the 12th May, 1847, the only record evidence of the existence of the office at all, consists of a resolution in the minutes of the Boards of Supervisors of the counties respectively.

By the eleventh section of the same act, it was provided that the Boards of Supervisors in the several counties of this state, (except New York,) should meet at the office of the county clerk in their respective counties, on the twenty-fifth day of May, then instant; and that when so convened, they should, in those counties having a population exceeding forty thousand, determine whether the office of county judge and surrogate should be separate; but that this section should not apply to those counties having a population exceeding forty thousand, the Boards of Supervisors whereof had already determined whether to have a separate officer as aforesaid.

By the "act to separate the offices of county judge and surrogate, in the county of St. Lawrence," passed May 10th, 1847,^(t) it was provided that the office of county judge, and the office of surrogate in the county of St. Lawrence, should be separate offices, and that a separate officer from that of county judge, should be elected in said county to perform the duties of the office of surrogate.^(u)

Of the Time of Election, and Term of Office of County Judges, and Officers Elected to Perform the Duties of the Office of Surrogate.

The 4th section of article 14 of the constitution, provided that the first election of county judges should take place at such time, between the first Tuesday of April, and the second Tuesday of June, one thousand eight hundred and forty seven, as might be prescribed by law; and that the said courts should respectively enter upon their duties on the first Monday of July next thereafter, but that the term of office of said judges as declared by the constitution, should be deemed to commence on the first day of January, one thousand eight hundred and forty eight.

By the twelfth section of the act of the 12th May, 1847,^(v) it was provided that the separate officers elected to perform the duties of the office of surrogate, and the local officers to discharge the duties of county judge and of surrogate, and elected at the election provided for in that act, should enter upon their duties on the first Monday of July, then next, and hold their offices for the term of four years from the first day of January, then next, and after the expiration of the term of office of those first elected, the term of office of said officers should be four years.

Of Local Officers in certain Counties, to discharge the Duties of County Judge and Surrogate; the Time of their Election, and their Term of Office.

Under the above 15th section of article 6 of the constitution, it was enacted by the legislature, by the act passed April 10th, 1849,^(w) that there shall be elected in the counties of Jefferson, Oneida, St. Lawrence, Oswego, Orange, Chautauque, Cayuga and Tioga, at the next general election and as often thereafter, at any succeeding general election, as may be necessary, in the same manner as other county officers are elected, a local officer or two local officers, to discharge the duties of county judge and surrogate in their respective counties, in

(t) S. L. 1847, 270.

(u) 1 R. S. (4th ed.) 313.

(v) S. L. 1847, Vol. I, 308; 1 R. S. (4th ed.) 313, sec. 14.

(w) S. L. 1849, chap. 306, p. 437.

cases of vacancy or inability of such officers or either of them, in pursuance of section fifteen of article sixth of the constitution. When the duties of county judge and surrogate shall be discharged by the same person, there shall be elected as aforesaid, one local officer, and in such of the said counties, where the office of county judge and surrogate shall be separate, there shall be elected as aforesaid two local officers, and the term of office of the persons so elected, shall commence on the first day of January next, after their election; they shall hold their offices for three years, and until others are chosen in their places and duly qualified, and shall be subject to removal in the same manner, and for the same causes as county judges and surrogates are subject to be removed.(x)

By acts of the legislature passed respectively April 6th, 1850,(y) and July 11th, 1851(z)—the latter amended by act passed March 19th, 1852(a)—it is provided that there shall be elected in each of the counties of Ulster and Chenango, (the Boards of Supervisors of the said counties having made application, as required by the constitution, to the legislature to provide for such election,) a local officer to discharge the duties of county judge, in the cases provided for in the fifteenth section of the sixth article of the constitution; such local officer to be known and designated as a special county judge, to be elected at the next general election in the said counties respectively, and once in four years thereafter, in the same manner as the county judge is elected, his term of office to commence on the first day of January next after his election, to hold his office for the term of four years and until another is chosen in his place and duly qualified, and to be subject to removal for the same causes and in the same manner as county judges.(b)

A similar act, passed March 28th, 1854,(c) provides for the election in the county of Sullivan, at the next general election, and as often thereafter at any succeeding general election as may be necessary, in the same manner as other county officers are elected, of a local officer to discharge the duties of county judge and surrogate of said county, in cases of vacancy or inability of such officer, in pursuance of section fifteen, of article sixth of the constitution; the term of office of the person so elected to commence on the first day of January next after his election; the person elected to hold his office for three years, and until another shall be chosen in his place and duly qualified, and to be subject to removal in the same manner and for the same causes as county judges and surrogates are subject to be removed.

Of the Election of the Surrogate of the County of New York, and his Term of Office.

By the act of the legislature passed December 15th, 1847,(d) it is provided that there shall be elected at the general annual election in

(x) 1 R. S. (4th ed.) 314, sec. 18.

(z) S. L. 1851, 997.

(b) In the county of Ulster, the special county judge, by the act, is to keep his office in the town of Kingston.

(c) S. L. 1854, ch. 88, p. 169.

(y) S. L. 1850, 339.

(a) S. L. 1852, 69; 1 R. S. (4th ed.) 134, 315.

(d) S. L. 1847, Vol. II, 727.

and for the city and county of New York, held in the month of November, in the same manner that other county officers of said city and county are elected, a surrogate for said city and county, who shall hold his office for the term of three years from the first day of January next after said election, on which day he shall enter upon the discharge of the duties of his office. The first election of said officer to take place at the general election in November, 1848, and the surrogate to enter upon the discharge of his official duties on the first day of January, 1849.(e)

Regulations respecting Vacancies in Office, and for dispensing with Officers authorized to be elected to discharge the Duties of the Office of Surrogate.

By the 13th section of the "act to provide for the election of certain judicial and other officers, and to fix their term of office," passed May 12, 1847,(f) as amended by the act of the 15th April, 1851,(g) whenever the office of county judge shall be vacant in a county having a population exceeding forty thousand, or the term of office of such judge shall be about to expire, the Board of Supervisors of that county, if there be a separate officer to perform the duties of the office of surrogate in said county, may resolve that there shall be no such separate officer in said county, and thereupon the office of such separate officer shall be deemed vacant and abolished from the time that the term of office of said separate officer shall expire; or if there be no such separate officer, said board may resolve that there shall be such separate officer in such county, in which case such separate officer shall be elected at the time and in the manner in all respects, and for the same term that the county judge in said county shall be elected; and the said county board may at the same time alter the salary of the county judge, and fix the salary of such separate officer, but no alteration of the salary of a county judge shall be made to take effect during the continuance of his term of office.

The second section of the same act provides that every resolution providing for the election of or dispensing with such separate officer, shall be immediately delivered by the clerk of the Board of Supervisors to the county clerk, whose duty it shall be to file the same in his office, and keep the same as a part of the records of such county, and within ten days after such resolution shall be filed in the office of any such county clerk, he shall transmit to the secretary of state, to be filed and kept in his office, a copy of such resolution duly certified by him.

In case a vacancy occurs in the office of surrogate of the county of New York, the Board of Supervisors of said city and county is authorized to fill such vacancy until the general election next ensuing the happening of such vacancy, when an election is to be had to fill the unexpired term.(h)

(e) 1 R. S. (4th ed.) 316, sec. 33.

(f) S. L. 1847, 308.

(g) S. L. 1851, chap. 175, p. 331; 1 R. S. (4th ed.) 313, sec. 15.

(h) S. L. 1847, Vol. II, 728, sec. 3; 1 R. S. (4th ed.) 316, sec. 35.

Of the Time for holding Surrogates' Courts, the Titles of the different Officers, and their respective Powers and Jurisdiction.

By the fourteenth section of the "act to provide for the election of certain judicial officers," &c., passed May 12, 1847,⁽ⁱ⁾ separate officers elected to perform the duties of the office of surrogate, under the fourteenth section of article 6 of the constitution, are to be denominated "surrogate" of their respective counties.

By the act "in relation to Surrogates' Courts held by county judges and other officers," passed July 21, 1853,^(j) it is provided that in those counties in which the county judge is also surrogate, he may be named and designated simply as surrogate, without any addition referring to his office as county judge; and in those counties where the surrogate is a distinct officer, the county judge or other officer, when acting as surrogate, shall be designated by his official title, with the addition of the words, "and acting surrogate."

The thirty-second section, article fourth of the "act in relation to the judiciary," passed May 12, 1847,^(k) provides that Surrogates' Courts, in counties in which the county judge performs the duties of the office of surrogate, may be held at the time and place at which county courts shall be held, and that the order of business of the county court, Court of Sessions and Surrogate's Court, shall be under the direction of the county judge, and that he shall perform the duties of the office of surrogate at such other times and places within his county, as the public interests shall require.^(l)

By the thirty-third section of the same act, in counties in which the duties of the office of surrogate are performed by a separate officer elected to perform the duties of the office of surrogate, Surrogates' Courts are to be held at the times and places, and in the manner and with the same powers and jurisdiction as are provided by law.^(m)

The thirty-seventh section of the same act provides as follows: "The county judge or other officer elected to perform the duties of the office of surrogate, and the local officers elected to discharge the duties of county judge and surrogate, when acting as surrogate, shall possess the same powers and perform all the duties and exercise the same jurisdiction as are now possessed, performed and exercised by the surrogates of their respective counties, so far as shall be consistent with the constitution and the provisions of this act. And all laws relating to the jurisdiction, powers and duties of surrogates, and Surrogates' Courts and their proceedings, shall be applicable to said judge or other officer, while performing the duties of the office of surrogate, so far as the same can be so applied, and are consistent with the constitution and the provisions of this act."

In the counties having a population exceeding forty thousand, (except the city and county of New York,) the Boards of Supervisors whereof have, by a resolution, provided for the election of an officer other than the county judge to perform the duties of the office of surrogate, pursuant to the act above quoted, "to provide for the election of certain

(i) S. L. 1847, Vol. I, p. 308; 1 R. S. (4th ed.) 313, sec. 13.

(j) S. L. 1853, 1228.

(l) 2 R. S. (4th ed.) 419, sec. 4.

(k) S. L. 1847, Vol. I, p. 329.

(m) *Ib.*, sec. 5.

judicial and other officers," &c., passed May 12th, 1847,⁽ⁿ⁾ every person elected pursuant to the said act, or the act above quoted amendatory thereof, passed April 15th, 1851,^(o) has power to take affidavits, and the proof and acknowledgment of deeds and other instruments in writing, with the same force and effect as if taken by a county judge, and for which he may charge the same fees.^(p)

In the counties of Orange, Chautauque, Cayuga and St. Lawrence, Tioga, Oneida, Jefferson and Oswego, the local officers elected to discharge the duties of county judge, (or of county judge and surrogate in those counties where there is no separate officer to discharge the duties of surrogate,) are designated as special county judges, and such local officers so elected to discharge the duties of surrogate in those counties where there is a separate officer to discharge the duties of surrogate are designated as special surrogates. Such local officers so elected to discharge the duties of county judge, or of county judge and surrogate, or to discharge the duties of surrogate in those counties where there is a separate officer to discharge the duties of surrogate, possess all the powers and are required to perform the duties which are possessed and can be performed by a county judge out of court; and any proceeding commenced before any such special county judge or special surrogate, may be finished by him, or he may, by order, direct that the same shall be finished by the county judge or by the surrogate, as the case may be.^(q)

In the counties of Ulster and Chenango, respectively, the special county judge authorized to be elected by the above quoted acts of April 6th, 1850, and July 11th, 1851, respectively, possess the powers and perform the duties of the county judge of said counties respectively, in cases of the inability of said county judge to perform the duties of his office, or in case of a vacancy in the office of county judge; and any proceeding commenced before such special county judge may be finished by him, or he may direct the same to be finished by the county judge. And any act done by said special judge is to be presumed to have been done in these cases until the contrary is shown.^(r)

By the above quoted act of the 28th March, 1854,^(s) the local officer authorized by that act to be elected in the county of Sullivan, to discharge the duties of county judge and surrogate in that county, in case he shall be of the degree of counsellor at law in the Supreme Court, shall also possess all the powers and perform all the duties that are now performed by a county judge at chambers; and any proceeding commenced before him may be finished by him, or he may, by an order made by him, direct that the same be finished by the county judge or surrogate.

Of the Assistants and Clerks to the Surrogates of the Counties of New York and Kings—their Appointment, Powers and Duties.

By the seventh section of the "act in relation to the fees and com-

(n) S. L. 1847, 306.

(o) S. L. 1851, 331.

(p) S. L. 1851, 332.

(q) S. L. 1851, 192; 1 R. S. (4th ed.) 314, sec. 19.

(r) See S. L. 1850, chap. 177, sec. 3; S. L. 1851, chap. 538, sec. 3; S. L. 1852, chap. 73; 1 R. S. (4th ed.) 314-15.

(s) S. L. 1854, 169. See *ante*, p. 11.

pensation of certain officers in the city and county of New York," passed December 10th, 1847,(t) the surrogate of the county of New York has the power to appoint so many assistants to aid him in the performance of the duties of his office, as he shall deem necessary for that purpose, not exceeding the number which he shall from time to time be authorized to appoint by the Board of Supervisors of the said city and county, whose duty it is from time to time to prescribe the number of assistants who may be so appointed, which number may at any time be increased or diminished by the said board. The said board fixes and may, from time to time, change the salaries to be paid to the assistants so appointed, but no such salary is to exceed the rate of twelve hundred dollars a year.(u)

The appointment of every assistant under and by virtue of the act is made in writing, and filed in the office of the clerk of the city and county of New York, before such assistant enters upon the discharge of his duties, and the surrogate is responsible for the acts of his assistants.(v)

Such assistants have power, during the term of their appointment, to administer and certify oaths and affirmations in all cases in which the surrogate is authorized to administer the same, but such assistant cannot perform such service until he shall have taken an oath of office before the clerk of the city and county of New York, in the form prescribed by law in cases of other public officers, which oath is to be thereupon subscribed and filed in said clerk's office.(w)

By an act of the legislature passed March 30th, 1849,(x) the surrogate of the county of Kings is authorized and required to appoint one or more clerks to assist him in his said office; a certificate in writing of every such appointment to be filed by the surrogate in the office of the clerk of said county, and to be deemed and taken as evidence of such appointment.

The clerks so appointed have power to administer oaths and perform such other duties as are properly incident to the business of the office, not inconsistent with the constitution and laws of the state.(y)

Of the Compensation of County Judges and other Officers authorized to discharge the Duties of the Office of Surrogate, and of the Surrogate of the County of New York and his Assistants, and the Clerks of the Surrogate of the County of Kings.

The 20th section of the sixth article of the constitution provides that no judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office.

The third subdivision of the above quoted 14th section of the same article, provides that the county judge shall receive an annual salary to

(t) S. L. 1847, Vol. II, p. 560.

(u) 1 R. S. (4th ed.) 708, sec. 207.

(v) S. L. 1847, Vol. II, 562, sec. 8; 1 R. S. (4th ed.) 708, sec. 208.

(w) S. L. 1850, chap. 201, p. 384; 1 R. S. (4th ed.) 708, sec. 209.

(x) S. L. 1849, chap. 173, p. 235, sec. 1; 1 R. S. (4th ed.) 699, sec. 146.

(y) *Ib.*, sec. 2; sec. 147.

be fixed by the Board of Supervisors, which shall be neither increased nor diminished during his continuance in office.

By the above quoted 11th section of the act of May 12, 1847,^(z) the Boards of Supervisors in the several counties of this state (except New York) were required at their meeting to be held on the 25th day of May then instant, to fix the salary of the county judge, and, in the proper counties, of the separate officer elected to perform the duties of the office of surrogate, and also at the same meeting in those counties having a population exceeding forty thousand, after having determined whether the office of county judge and surrogate should be separate; if separate, to fix the salary of such separate officer.^(a)

By the third subdivision of the third section of the "act to provide for the payment of certain expenses of government, to fix the salaries of certain judicial and other officers, and for other purposes," passed May 12, 1847,^(b) it is provided that the salary of the county judge shall be paid by the county and at the close of each quarter.

The fourth section of the same act provides that any separate officer elected to perform the duties of the office of surrogate shall receive an annual salary, which shall be fixed by the Board of Supervisors, and paid at the close of each quarter by the county in which he shall be elected, and such salary shall not be increased or diminished during his continuance in office.^(c)

The fifth section of the same act provides that all local officers elected in any county of this state to discharge the duties of county judge and surrogate, and exercise such other powers in special cases as may be provided by law, shall for their services respectively be paid by the county in which they shall be elected, such reasonable compensation as the Board of Supervisors of such county may deem proper to allow.^(d)

By the 8d section of the act of 10th April, 1849,^(e) authorizing the election of local officers to discharge the duties of county judge and surrogate in the counties of Orange, Chautauque, Cayuga and St. Lawrence, Tioga, Oneida, Jefferson and Oswego, it was provided that such local officers should receive for the services to be rendered by them under the provisions of the act, such compensation as should be allowed to them respectively by the Boards of Supervisors in the said respective counties.

The act of March 28, 1854, to authorize the election of a local officer to discharge the duties of county judge and surrogate, in the county of Sullivan, contains the same provision for the compensation of such officer.^(f)

The above quoted provisions of the act of May 12, 1847, apply to the special county judges authorized to be elected in the counties of Ulster and Chenango.^(g)

(z) S. L. 1847, 307.

(a) The section further confirms the proceedings of those Boards of Supervisors which had already acted in the premises.

(b) S. L. 1847, 312; 1 R. S. (4th ed.) 712, sec. 4.

(c) 1 R. S. (4th ed.) 712, sec. 5.

(d) *Ib.*, sec. 6.

(e) S. L. 1849, 437. See *ante*, p. 10.

(f) S. L. 1854, 169, sec. 3.

(g) S. L. 1850, 340, sec. 5; S. L. 1851, 997, sec. 5; 1 R. S. (4th ed.) 314, 315.

By the second section of the act "in relation to the fees and compensation of certain officers in the city and county of New York," passed December 10, 1847,^(h) it is provided that there shall be allowed to the surrogate of the city and county of New York, a salary at and after the rate of three thousand dollars a year, as his compensation for all services whatever which he may perform as such surrogate or by virtue of his office.⁽ⁱ⁾

By the sixth section of the same act, the supervisors of the said city and county of New York, may, at any time in the year one thousand eight hundred and forty-seven, and in every second year after the year one thousand eight hundred and forty-seven, increase or diminish the salary of the said surrogate as fixed by the act, no such increase or diminution to vary said salary more than five hundred dollars from the sum at which it is fixed by the act, and any such increase or diminution to take effect on the first day of January next after the same shall be so made by the said board.^(j)

The eleventh section of the same act, provides that no account for the compensation for services of any assistant to be appointed under and by virtue of the act shall be allowed, until such assistant shall have certified on oath or affirmation, that the services have been performed for which such account may be rendered, and that he has not in any way, directly or indirectly, paid or given, nor contracted to pay or give, any reward or compensation for his office or employment, or the emoluments thereof.^(k)

By the fourteenth section of the same act, the salary of the surrogate and his assistants therein before provided for, and which might thereafter be provided for by the Board of Supervisors of the said city and county, under and by virtue of the act, is to be paid out of the fees, perquisites and emoluments received from the surrogate into the treasury of said city and county, subject to the limitation afterwards prescribed in the act, upon the warrant of the comptroller of the said city and county, in quarter yearly payments, unless a different period for such payments is fixed by the said Board of Supervisors.^(l)

By the fifteenth section of the same act, any contingent expenses necessarily incurred by the surrogate, and for which the common council of the city of New York shall make appropriation, are to be paid out of the fees, perquisites and emoluments received from the surrogate into the treasury of the city and county of New York, on the warrant of the comptroller of said city and county.^(m)

And by the sixteenth section, the comptroller of the said city and county is to keep a separate and distinct account of all fees, perquisites and emoluments received from the surrogate, and of all disbursements on account of his office, for the salary of the principal officer and assistants therein, and for the aforesaid contingent expenses thereof; and no greater sum is to be paid in any one year, for such disbursements for the said office, than shall be received into the treasury of the said city and county, on account of the fees, perquisites and emoluments

(A) S. L. 1847, Vol. II, 560.

(j) 1 R. S. (4th ed.) 707, sec. 208.

(k) 1 R. S. (4th ed.) 710, sec. 216.

(i) 1 R. S. (4th ed.) 707, sec. 202.

(k) S. L. 1847, 563; 1 R. S. (4th ed.) 709.

(m) *Ib.*, sec. 217.

accruing at such office during such year, which year is to be taken to mean the period from the first day of January, to the thirty-first day of December next following, both inclusive.⁽ⁿ⁾

In the county of Kings, the Board of Supervisors is to audit and allow as compensation to the clerk or clerks authorized by the act of March 30th, 1849, above quoted, to be appointed by the surrogate of the county, for the performance of his or their duties, a sum not exceeding in amount the balance of the fees and emoluments by law allowed to be received for the benefit of the county, and actually paid into the treasury thereof by the said surrogate; after deducting therefrom the amount fixed by the Board of Supervisors, to be paid to said surrogate for his salary.^(o)

Of the Security required of Surrogates, and the Prosecution of their official Bonds.

The Revised Statutes contain the following provisions, regulating the security to be given by surrogates:

Sec. 144. [Sec. 87.] Every person hereafter appointed [now elected] to the office of surrogate of any county, shall within twenty days after receiving notice of such appointment, execute to the people of this state, with two or more sureties, being freeholders, a joint and several bond conditioned for the faithful performance of his duty, and for the application and payment of all moneys and effects, that may come into the hands of such surrogate in the execution of his office. The bond of the surrogate of the city and county of New York, shall be in the penal sum of ten thousand dollars; of every other surrogate in the sum of five thousand dollars.^(p)

Sec. 145. [Sec. 88.] The clerk of the county for which such surrogate shall have been appointed, shall be the judge of the sufficiency of the sureties; and in case he shall be satisfied by the oath of the sureties, or otherwise, that they are good and sufficient, he shall indorse on the bond a certificate of his approval, and file such bond in his office, there to remain a matter of record.^(q)

By an act of the legislature of the 10th March, 1847,^(r) the Board of Supervisors, of the city and county of New York, are authorized and empowered to require from the surrogate of the city and county of New York, and from any of his assistants, such security for the faithful performance of his duty, as to the said Board of Supervisors may seem necessary and proper.

With respect to suits on the official bonds of surrogates, the Revised Statutes provide, that whenever the surrogate of any county shall be guilty of any default or misconduct in his office, the party aggrieved thereby may apply to the Court of Chancery,^(s) for leave to prosecute the official bond of such surrogate. The application must be accom-

(n) *Ib.*, sec. 218.

(o) S. L. 1849, 235, chap. 173, sec. 2; 1 R. S. (4th ed.) 700, sec. 147.

(p) 1 R. S. 382; 4th ed. 699.

(q) *Ib.*

(r) S. L. 1847, 560, sec. 13; 1 R. S. (4th ed.) 709, sec. 215.

(s) Now to the Supreme Court. See "act in relation to the judiciary," art. 3, sec. 16; S. L. 1847, 323.

panied by the same proof required by law in proceedings on sheriff's bonds; and upon such leave being granted, the applicant is authorized to prosecute such bond in the name of the people of this state, in the Supreme Court only, in the same manner, with the like effect and subject in all respect to the provisions of law, in respect to suits on the official bonds of sheriffs; and the Supreme Court possesses the same powers in relation to such suits.(t)

Of the Locality of the Office of Surrogate, and the Oath of Office.

The surrogate is a local officer, and is confined in the execution of his duties to the county for which he is elected.(u) Before entering on the duties of his office, and within fifteen days after notice of his election, or within fifteen days after the commencement of his term of office, the surrogate is required to subscribe and take the constitutional oath of office, which must be filed in the office of the clerk of the county.(v)

Of the Specific Powers and Duties of Surrogates.

The first title of the second chapter of the third part of the Revised Statutes, entitled "of Surrogates' Courts," provides as follows:

Sec. 1. Every surrogate who shall have duly qualified, by taking the oath and executing the bond required by law, shall hold a court within the limits of the county for which he was appointed, and shall have power:

1. To take the proof of wills of real and personal estate, in the cases prescribed by law; and also to take the proof of any will relating to real estate situated within the county of such surrogate, when the testator in such will shall have died out of this state, not being an inhabitant thereof, and not leaving any assets therein;

2. To grant letters testamentary, and of administration;

3. To direct and control the conduct, and settle the accounts of executors and administrators;

4. To enforce the payment of debts and legacies, and the distribution of the estates of intestates;

5. To order the sale and disposition of the real estates of deceased persons;

6. To administer justice in all matters relating to the affairs of deceased persons, according to the provisions of the statutes of this state;

7. To appoint guardians for minors, to remove them, to direct and control their conduct, and to settle their accounts, as prescribed by law;

8. To cause the admeasurement of dower to widows;

Which powers shall be exercised in the cases, and in the manner prescribed by the statutes of this state.(w)

It is difficult to say what direction and control over executors and administrators, was intended to be given to the surrogates by the above

(t) 2 R. S. 479; 4th ed. 721.

(u) See 1 R. S. 101; 4th ed. 308, sec. 9, (sec. 11.)

(v) 1 R. S. 119, 20; 4th ed. 330.

(w) 2 R. S. 220; 4th ed. 418.

third subdivision of this section. It has been determined that its general language is not to be construed in such a manner as to give to a surrogate the power to direct and control the conduct of executors and administrators, relative to suits and proceedings in other courts. Thus, where an application was made by a legatee to the surrogate, for an order directing the executor to desist from the further defence of an action upon certain promissory notes of the testator, alleged by the petitioner to be due, and which, if they were to be charged upon the property, would render the estate insufficient to pay the debts and general legacies, and also to desist from the further prosecution of a suit in Chancery, brought by the executors for a discovery of the consideration of the notes, and from any further proceedings to resist the claim of the holder and owner of the notes, until the residuary legatees, for whose benefit the claim was resisted, should give security to indemnify the estate of the testator against the costs and charges of control the litigation, it was held on appeal that the surrogate had not jurisdiction to make the order.(x) The words of the subdivision, however, are general, and would seem to be directly applicable to a case in which an executor persists in exercising the functions and discharging the duties of his trust erroneously or irregularly. And any person who suffers an injury by the erroneous action of the executor in his proceedings in the surrogate's office, may lawfully call upon the surrogate to control his conduct. Thus, if in making out an inventory the executor should adopt an erroneous principle, it seems that he may be controlled by the surrogate.(y)

In *Jennings v. Phelps, administrator, &c.*,(z) the petitioner filed his petition, praying for an account and for payment of his demand. The surrogate declined to make a decree for the payment, but as the petitioner had not presented his demand to the administrator within six months from the publication of the notice for the exhibition of claims under the statute,(a) and the administrator therefore appeared to be at liberty to distribute the estate before suit brought on the claim, the surrogate, to protect the applicant, directed that the order dismissing the petition for payment, should provide that the administrator refrain from distribution for the period of thirty days, within which time the petitioner might bring his action at law.

Under the above seventh subdivision, empowering the surrogate to direct and control the conduct of guardians, and to settle their accounts where a guardian has been superseded and a new guardian has been appointed in his place, upon proceedings taken to compel the former guardian to account, the surrogate has the power not only to settle the account of such former guardian, to ascertain and declare the quantity, quality and condition of the ward's property, and the balance due to him from the guardian, but to decree and adjudge the time when, the person to whom, and the manner in which the same shall be paid or delivered over.(b) "The power to direct and control the conduct of

(x) *In the Matter of Parker*, 1 Barb. Ch. Rep. 154.

(y) *Bliss v. Sheldon*, 7 Barb. Sup. Ct. Rep. 152.

(z) 1 Bradf. Sur. Rep. 485.

(a) 2 R. S. 89; 4th ed. 275.

(b) *Seaman v. Duryea*, 10 Barb. Sup. Ct. Rep. 523.

guardians," says Mr. Justice Brown in *Seaman v. Duryea*,^(c) "cannot be a barren power. To direct and control is to govern and to command, and the authority to appoint and to remove guardians or other trustees, and to direct and control their conduct, given by law to a court of justice, must comprehend the power to compel them to do whatever the law requires they should do, or it comprehends nothing. If it be just and lawful that a trustee, upon the expiration of his trust, should pay and deliver over the trust money or property to his successor, or to his *cestui que trust*, then the tribunal or officer having the direction or control of his conduct, has the right to make an order or decree that it shall be done."

A surrogate has no authority to remove a guardian, or to accept the resignation of a guardian appointed by himself, and appoint another in his place, or to compel a guardian to account, except in the particular cases specified in the statute on this subject, and where the surrogate appointed a new guardian in the place of the guardian appointed by the Court of Chancery, and proceeded to settle the account of the old guardian, it was held that the whole proceedings were void for want of jurisdiction.^(d)

The surrogate has not jurisdiction, upon a summary application to him, to compel an administrator to deliver over property to the owner thereof, which property has been taken possession of by him as a part of the estate to be administered by him, although his claim to such property is wholly unfounded, or is merely colorable.^(e)

The surrogate has not any authority to inquire into or settle the rights of the heirs at law to property in the hands of an executor or administrator. The powers and duties of surrogates are prescribed by law, and do not include the power to adjudicate between the heir and personal representative.^(f)

By the act of April 10, 1850, "to provide for the settlement of the accounts of testamentary trustees," amending the Revised Statutes,^(g) jurisdiction is conferred upon the surrogate of the county in which any last will or testament shall have been proved, to settle the accounts of any trustee created by such last will or testament, or appointed by any competent authority to execute any trust created by any such last will or testament, or of any executor or administrator with the will annexed, authorized to execute any such trust upon a voluntary accounting by such trustee, executor or administrator with the will annexed, in the manner provided by law for the final settlement of the accounts of executors and administrators.

With respect to the jurisdiction in cases of the erection of a new county, it was provided by an act of 1843, that in all cases of the erection of a new county hereafter, the surrogate of such county may take the proof of wills, and grant letters testamentary and of administration,

(c) *Supra*.

(d) *In the Matter of Dyer, an infant*, 5 Paige, 534.

(e) *Marston v. Paulding*, 10 Paige, 40.

(f) *Shumway v. Cooper*, 16 Barb. Sup. Ct. Rep. 556.

(g) S. L. 1850, 587; 2 R. S. (4th ed.) 279.

in cases where the deceased, at the time of his death, resided within the territory embraced within such county.(h)

The above quoted title of the Revised Statutes further provides as follows:

Sec. 10. [Sec. 6.] Every surrogate shall have power:

1. To issue subpoenas under his seal of office, to compel the attendance of any witness residing or being in any part of the state, or the production of any paper, material to any inquiry pending in his court, the form of which shall be similar to that used by courts of record in the like cases; [As amended, 1830, ch. 820, sec. 66.](i)

2. To punish disobedience to any such subpoena, and to punish witnesses for refusing to testify after appearing, in the same manner, and to the same extent, as courts of record in similar cases, and by process, similar in form to that used by such courts;

3. To issue citations to parties in all matters cognizable in his court, and in the cases prescribed by law, to compel the appearance of such parties;(j)

4. To enforce all lawful orders, process and decrees of his court, by attachment against the persons of those who shall neglect or refuse to comply with such orders or decrees, or to execute such process; which attachments shall be in form similar to that used by the Court of Chancery in analogous cases;(k)

5. To exemplify under his seal of office, all transcripts of records, papers or proceedings therein; which shall be received in evidence in all courts, with the like effect as the exemplifications of the records, papers and proceedings of courts of record;

6. To preserve order in his court during any judicial proceeding, by

(A) S. L. 1843, 236, sec. 4; 2 R. S. (4th ed.) 266, sec. 72.

(i) Sec. 3. The seals of the several surrogates of the respective counties of this state, of which a description in writing has heretofore been deposited and recorded in the office of the secretary of this state, shall continue to be the seals of the Surrogates' Courts of such counties respectively. 2 R. S. 221; 4th ed. 419.

Sec. 4. Whenever a surrogate shall be appointed for any county hereafter organized, or for any county for which no surrogate's seal shall have been provided, he shall, at his own expense, cause a seal to be made for his office, with such device as he shall think proper, upon which shall be inscribed the name of the county for which such surrogate was appointed, and the words, "Surrogate's Seal." He shall deliver a description of such seal to the secretary of state, to be by him deposited and recorded in his office as part of the public records of this state; and the same shall thereupon be the seal of the Surrogate's Court of such county. Ib.

Sec. 5. Whenever the seal of the Surrogate's Court of any county shall be so injured that it cannot be conveniently used, the surrogate shall destroy the same; and whenever the surrogate's seal shall be lost or destroyed, he shall, at his own expense, provide a new seal, similar in all respects to such former seal, and shall give notice thereof, in writing, to the secretary of state, who shall file such notice; and thereupon such new seal shall become the seal of the Surrogate's Court of such county. Ib.

The seals of the surrogates of the respective counties of this state shall continue to be the seals of the Surrogates' Courts of said counties, and shall be kept and used as such by the county judge, or other officer authorized to perform or discharge the duties of the office of surrogate; a description of said seals shall be deposited or recorded in the office of the secretary of state, which description shall remain of record. Act in relation to the Judiciary, S. L. 1847, 319, art. 6, sec. 72.

(j) The process of summons is the one expressly designated in the statutes for compelling the return of an inventory, and for procuring an executor to qualify. It differs in nothing from a citation, except that by it the party is "summoned," instead of "cited." Formerly citations ran in the same way.

(k) See *Doran v. Dempsey*, 1 Bradf. Surr. Rep. 490; *Seaman v. Duryea*, 10 Barb. S. C. R. 523.

punishing contempts which amount to an actual interruption of business, or to an open and direct contempt of his authority or person, in the same manner, and to the same extent, as courts of record.^(l)

The authority conferred upon the surrogate, by the above 4th subdivision of the above 6th section of the statute, to enforce all lawful orders, process and decrees by attachment, extends to orders and decrees for the payment of money. The language of this subdivision is not limited in its application, to enforce obedience to subpoenas, to compel witnesses to give evidence, to the preservation of order during any judicial proceeding, nor to enforce orders which require the production of wills or other papers, or the filing of inventories, nor to compel the appearance of parties, because the performance of the latter class of duties is expressly provided for, under the name of orders and process in the same subdivision, and the former in the 2d and 6th subdivisions of the same section; nor does the 4th subdivision discriminate between decrees for the payment of money, and those for the transfer and delivery of specific property. Neither is this power to proceed by attachment against the person, taken away by any of the provisions of the act of the 16th May, 1837, concerning the proof of wills, Surrogates' Courts, &c.,^(m) but rather such power as the surrogate had to enforce his decrees, previous to the passage of that act, is confirmed and enlarged by force of its provisions; nor was the surrogate's power under this provision, affected by the act to abolish imprisonment for debt,⁽ⁿ⁾ and the second section of that act, declaring that its provisions shall not extend to contempts to enforce civil remedies, and the act of the 9th May, 1846,^(o) providing that in actions upon contract for moneys received by male persons in a fiduciary capacity, the defendants "shall be liable to imprisonment in the same manner as in actions for wrongs," indicate no disposition to relax the law of imprisonment, in regard to trustees made liable for trust property.^(p)

The act of the 16th May, 1837, "concerning the proof of wills," &c., "and Surrogates' Courts," provides as follows:

Sec. 61. Whenever any surrogate shall issue a citation to any administrator, executor or guardian, requiring him to show cause why he should not be removed from office, the surrogate shall have power to enter an order enjoining such executor, administrator or guardian from further acting in the premises, until the matter in controversy shall be disposed of.^(q)

Sec. 62. The surrogate may adjourn any proceeding pending before him, from time to time, as the ends of justice may require, and may administer oaths to witnesses in any matter or cause pending before him, and in all other cases where it may be necessary in the exercise of the powers and duties of such surrogate.^(r)

Sec. 63. After any decree is made by a surrogate for payment of money by an executor or administrator or guardian, on application he shall make out a certificate, stating the names of the parties against

(l) 2 R. S. 221; 4th ed. 419, 420.

(m) S. L. 1837, 524.

(n) S. L. 1831, 396. But see *Hosack v. Rogers*, 11 Paige, 603.

(o) S. L. 1846, 164. See also Code, secs. 179, 288, 289.

(p) *Seaman v. Duryea*, 10 Barb. Sup. Ct. Rep. 523, 534, per Brown, J.

(q) 2 R. S. (4th ed.) 421, sec. 15.

(r) *Ib.*, sec. 16.

and in favor of whom the decree is made, with the trade, profession or occupation of the parties respectively, in their places of residence, in which he shall state the amount of debt and costs directed to be paid by such decree.(s)

Sec. 64. On such certificate being filed with the clerk of any county, the same shall be entered and docketed on the books now required by law to be provided and kept for the purpose of docketing judgments, the transcripts or certificates of which shall be filed with such clerk, and shall thenceforth be a lien on all the lands, tenements, real estate and chattels real, of every person against whom such decree shall be entered, situate in the county in which said surrogate's certificate may be filed, and execution shall be issued thereon in the same manner as though the same was a judgment recovered in the Court of Common Pleas, [county court] of said county. [*As amended by sect. 2, of chap. 104 of laws of 1844.*] The first section of chap. 104, of laws of 1844, provides that the 64th section of the act of 1837, is repealed. The second section provides that "the 64th section of last said act shall be" as above given.

Sec. 65. If such execution be issued and returned unsatisfied, the surrogate shall, on application, assign the bond given by such executor, administrator or guardian, to the person in whose favor such decree is made, for the purpose of being prosecuted.(t)

Sec. 66. Process of attachment or other compulsory process authorized by law to enforce the orders, process or decrees of Surrogates' Courts, may be issued by the surrogate of one county to the officers required by law to serve such process in any other county of the state where it may be necessary to serve the same, and the officer receiving the same shall have power and authority to arrest the person or persons against whom said process is issued, and to convey the person or persons so arrested to the county and place where the writ may be returnable.(u)

Sec. 77. On any proceedings or matter in controversy before a surrogate, when the testimony of a witness in any other state or territory of the United States, or any foreign place, is required by any party to such proceedings or controversy, the surrogate may issue a commission to take such testimony, in the same manner as by law the same may be done in any court of record.(v)

The general rule of the Revised Statutes, that all writs and process shall be in the name of the people of this state, except where otherwise provided by law, applies to process issued out of Surrogates' Courts.(w)

Of the Time when the Surrogate's Court shall be open.

The above mentioned title of the Revised Statutes concerning Surrogates' Courts, contains the following provision;

Sec. 6. [Sec. 2.] 'The Surrogates' Courts shall be at all times open

(s) 2 R. S. (4th ed.) 421, sec. 17.

(t) *Ib.*, sec. 18.

(u) *Ib.*, sec. 19.

(v) S. L. 1837, 535, 537; 2 R. S. (4th ed.) 420, sec. 11.

(w) 2 R. S. 275, sec. 16, (sec. 8)

for the hearing of any matters within the jurisdiction thereof, and particularly on Monday of each week, it shall be the duty of every surrogate to attend at his office, to execute the powers and duties conferred on him.(x)

In the counties, however, in which the county judge performs the duties of the office of surrogate, as has been seen,(y) Surrogates' Courts may be held at the time and place at which county courts shall be held, and the order of business of the county court, Court of Sessions, and Surrogate's Court, is under the direction of the county judge, and he is required to perform the duties of the office of surrogate, at such other times and places within his county as the public interests require. In the case of every other officer elected as surrogate or to discharge the duties of the office of surrogate, the above provision of the Revised Statutes applies.

The sittings of the Surrogate's Court, as of every court within this state, must be public, and every citizen may freely attend the same.(z) The court cannot be opened or transact any business on Sunday.(a)

There are no stated terms in the Surrogate's Court.(b)

Of the Books and Records to be kept by Surrogates—the filing and preserving of Papers, and of Searches and Transcripts.

The above quoted title of the Revised Statutes concerning Surrogates' Courts, provides as follows;

Sec. 13. [Sec. 7.] The surrogate of each county shall provide and keep the following books:

1. A book in which shall be fully and distinctly recorded all wills, testaments and codicils proved before him, and the proof thereof; and in which he may also record any will relating to real estate situated within his county, which shall have been duly proved before, and recorded by, any other surrogate, upon the production of an exemplified copy of such record;

2. A book in which shall be recorded in like manner, all letters testamentary, and of general and special administration;

3. A book in which shall be entered all minutes of other proceedings, by or before him, in relation to the estates of deceased persons, with all orders and decrees made by him, and minutes of all citations, subpoenas, attachments, and other process issued by him, in relation to such estates; and the testimony taken by him in relation to the granting or revocation of letters testamentary, or of administration;(c)

(x) 2 R. S. 221; 4th ed. 419.

(y) *Ante* p.

(z) 2 R. S. 274; 4th ed. 463, sec. 1.

(a) *Ib.*, sec. 15, (sec. 7.)

(b) *Western v. Romaine*, 1 Bradf. Surr. Rep. 37.

(c) This provision, so far as it requires the surrogate to enter in a book minutes of subpoenas issued by him, is not always complied with. The writ of subpoena in a court exercising jurisdiction over a large population, is one which is issued daily, almost hourly, often necessarily, in blank, as to the person to whom it is to be directed, and as to the day of its return; and frequently several must be issued in this manner, in the same matter or controversy. To make a minute of each one is in many instances impracticable. In cases arising under the eighth section of the act respecting the public administrator in the city of New York, (2 R. S. 120,) the uniform practice has been to enter a formal order in the minutes for the issuing of the subpoena.

4. A book in which shall be recorded the appointment of guardians for infants, and the revocation of any such appointment;

5. A book in which shall be entered all proceedings in relation to the admeasurement of dower, and all orders, reports and decrees thereupon.

To each of the said books there shall be attached an index of the subjects therein, with a reference to the pages where such subjects may be found; which, together with such books, shall at all proper times be open to the inspection of any person paying the fees allowed by law for such examination.^(d)

The title of the Revised Statutes relative to sales of real estate, by order of surrogates, contains the following provision:

Sec. 71. [Sec. 60.] The several surrogates shall record in books to be provided by them for that purpose, all orders and decrees by them made upon any proceedings before them in relation to the sale of real estate, and shall file and preserve all papers, returns, vouchers and documents connected with such proceedings.^(e)

The law of 1837 enacts as follows:

Sec. 3. Every surrogate shall keep a book of fees, which shall pertain to his office, and be subject to inspection in the same manner that his books of record are, in which he shall enter at length and by items the fees charged and received by him on all proceedings had before him under the name of each intestate or testator.^(f)

By the ninth section of the "act in relation to the fees and compensation of certain officers in the city and county of New York," passed December 10th, 1847, it is made the duty of the surrogate of the county of New York, to keep an exact account in a book or books to be provided for that purpose, at the expense of the people of the city of New York, of all fees, perquisites and emoluments actually received by him for any service done by him or his assistants in his or their official capacity, by virtue of any law of this state; and of all fees, perquisites and emoluments which such surrogate shall be entitled to demand and receive from any person, for any service rendered by him or them in his or their official capacity, pursuant to law. Such books are to show when and for whom every such service shall have been performed, its nature, and the fees chargeable therefor; and are at all times, during office hours, to be open to the inspection, without any fee or charge therefor, of all persons desiring to examine the same; and are to be deemed a part of the records of the office, and are to be preserved therein as other books of record are.^(g)

Under the Revised Statutes, up to the time of the law of 1837, the surrogate was required to provide and keep a book, in which should be entered all accounts of executors and administrators settled before him; and also a book in which should be recorded the accounts rendered by guardians at full length. By the second section of the law of 1837,^(h) these provisions are repealed, and the surrogate is required "to file said accounts, and to record with his decree a summary state-

^(d) 2 R. S. (4th ed.) 420, 421; S. L. 1837, 524.

^(e) 2 R. S. 110.

^(f) S. L. 1837, 524; 2 R. S. (4th ed.) 421.

^(g) S. L. 1847, 562; 1 R. S. (4th ed.) 708, sec. 211.

^(h) S. L. 1837, 524; 2 R. S. (4th ed.) 420.

ment of the same, as the same shall be finally settled and allowed by him, which shall be referred to and taken as part of the final decree." For security of preservation, and for convenience of reference, the recording of accounts, although attended with some expense, was a wise and salutary requirement, and its abolition has not been deemed any improvement upon the previous law.

The above mentioned title of the Revised Statutes concerning Surrogates' Courts, further provides as follows:

Sec. 14. [Sec. 8.] Every surrogate shall carefully file and preserve all affidavits, petitions, reports, accounts, and all other papers belonging to his court; and all such papers, and the books kept by him, shall belong and appertain to his office, and be delivered to his successor.(i)

It is the duty of the surrogate, upon the taking of an account, or upon any other proceeding, which may be the subject of an appeal, to reduce to writing and preserve the evidence and admissions of the parties, so far as to enable him or his successor to make a correct return of the facts in case it shall be necessary, in consequence of an appeal to a higher tribunal.(j)

With respect to searches and transcripts, the act of December 14, 1847, to amend the act in relation to the judiciary, contains the following provision:

Sec. 40. It shall be the duty of every surrogate, of every county clerk, of the register of the city and county of New York, of the clerk of every court, and of every person having the custody of the records or papers in any public office, to search the files, papers, records and dockets in his office, to make transcripts from any such papers, records and dockets, and to certify to the correctness of such transcripts and searches, when required to do so, and on the payment or offer to pay the fees chargeable by law for such service; and every surrogate, clerk, register or other officer who shall neglect or refuse to make such search, transcript or certificate as aforesaid, when he shall be so required and the fees therefore shall be paid or offered to be paid, shall be deemed guilty of a misdemeanor.(k)

Of the Execution of Process issued out of Surrogates' Courts, and of Attachments for Contempts.

The above mentioned title of the Revised Statutes concerning Surrogates' Courts, provides as follows:

Sec. 23. [Sec. 9.] Every sheriff, jailer, coroner or other executive officer to whom any citation, subpoena, attachment or other process, issued by a surrogate's court, may be directed or delivered for the purpose of being executed, shall execute the same in the same manner as if issued by a court of record; and for any neglect or misfeasance therein, shall be subject to the same penalties, actions and proceedings as if the same had occurred in relation to any process issued by courts of record.(l)

(i) 2 R. S. 223.

(j) *Williamson v. Williamson*, 6 Paige, 300.

(k) S. L. 1847, Vol. II, 645, 646; 2 R. S. (4th ed.) 478, sec. 35.

(l) 2 R. S. 223; 4th ed. 421.

The law of 1837, as has been seen, contains the following provision :

Sec. 66. Process of attachment or other compulsory process authorized by law to enforce the orders, process or decrees of Surrogates' Courts, may be issued by the surrogate of one county to the officers required by law to serve such process in any other county of the state where it may be necessary to serve the same; and the officer receiving the same shall have power and authority to arrest the person or persons against whom said process is issued, and to convey the person or persons so arrested to the county and place where the writ may be returnable.(m)

The same law further provides as follows:

Sec. 67. All attachments and other compulsory process which may be issued by any surrogate, shall be made returnable to the county where the same may issue; and the tenth, twelfth and thirteenth sections, and sections sixteenth to thirty-second, title thirteenth of chapter eighth of the third part of the Revised Statutes, inclusive, shall apply to attachments issued by surrogates.(n)

The sections referred to in this provision are as follows:

Sec. 10. When an attachment shall be issued, according to the provisions of this title, by the special order of any court, such court shall direct the penalty in which the defendant shall give bond for his appearance to answer.(o)

Sec. 12. Upon arresting any defendant upon an attachment, to answer for any alleged misconduct, the sheriff shall keep such defendant in his actual custody, and shall bring him personally before the court issuing the attachment, and shall keep and detain him in his custody, until such court shall have made some order in the premises, unless such defendant shall entitle himself to be discharged, as prescribed in the next section.

Sec. 13. In cases where a sum shall have been indorsed on any attachment issued by the special order of the court, and where any sum shall have been so indorsed by any judge or other officer, as herein before prescribed, the defendant shall be discharged from arrest on such attachment, upon executing and delivering to the officer making the same, at any time before the return day in such writ, a bond with two sufficient sureties in the penalty indorsed on such attachment to such officer, by his name of office and his assigns, with a condition that the defendant will appear on the return of such attachment, and abide the order and judgment of the court thereupon.(p)

Sec. 16. Upon returning any attachment, the officer executing the same shall return the bond, if any taken by him, of the defendant, which shall be filed with such attachment.(q)

Sec. 17. The sheriff or officer to whom any attachment shall be delivered, shall return the same by the return day specified therein, without any previous rule or order for that purpose; and in case of default, an attachment may be issued against him, of course, upon being allowed by a judge of the court, or by some officer authorized to perform the

(m) S. L. 1837, 535; 2 R. S. (4th ed.) 421, sec. 19. See *The People v. Pelham*, 14 Wend. 48.

(n) 2 R. S. (4th ed.) 422, sec. 20.

(o) 2 R. S. 536; 4th ed. 770.

(p) 2 R. S. 537; 4th ed. 770.

(q) 2 R. S. 537; 4th ed. 771.

duties of such judge, upon proof of such default; and in such allowance, the cause of issuing the same shall be stated, and that the defendant is not to be discharged upon bail, or in any other manner but by order of the court.

Sec. 18. The officer to whom such last mentioned attachment shall be delivered, shall execute the same by arresting and keeping the defendant in his custody, bringing him personally before the court, and detaining him in such custody, until the order of the court.

Sec. 19. When any defendant arrested upon an attachment shall have been brought into court, or shall have appeared therein, the court shall cause interrogatories to be filed, specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto; to which the defendant shall make written answers on oath, within such reasonable time as the court shall allow. The court may receive any affidavits or other proofs, contradictory of the answers of the defendant, or in confirmation thereof; and upon the original affidavits, such answers and such subsequent proof shall determine whether the defendant has been guilty of the misconduct alleged.

Sec. 20. If the court shall adjudge the defendant to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or actually did defeat, impair, impede or prejudice the rights or remedies of any party, in a cause or matter depending in such court, it shall proceed to impose a fine or to imprison him, or both, as the nature of the case shall require.(r) But in all cases which have arisen or may hereafter arise under the provisions of this title, the court or tribunal ordering such imprisonment, may, in their discretion, (in cases of inability to perform the requirements imposed,) relieve the person or persons so imprisoned, in such manner and upon such terms as they shall deem just and proper.(rr)

Sec. 21. If an actual loss or injury shall have been produced to any party, by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him on the order of the court. And in such case the payment and acceptance of such fine shall be an absolute bar to any action by such aggrieved party, to recover damages for such injury or loss.

Sec. 22. In all other cases the fine shall not exceed two hundred and fifty dollars, over and above the costs and expenses of the proceedings.(s)

Sec. 23. When the misconduct complained of consists in the omission to perform some act or duty, which it is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceedings.

Sec. 24. In such case the order and process of commitment shall specify the act or duty to be performed, and the amount of the fine and expenses to be paid.

Sec. 25. In all other cases, where no special provision is otherwise made by law, if imprisonment be ordered, it shall be for some reason-

(r) 2 R. S. 538. (rr) S. L. 1843, ch. 9; 2 R. S. 4th ed. 771. (s) 2 R. S. 538; 4th ed. 772.

able time, not exceeding six months, and until the expenses of the proceeding are paid; and also, if a fine be imposed, until such fine be paid; and in the order and process of commitment, the duration of such imprisonment shall be expressed.

Sec. 26. Persons proceeded against according to the provisions of this title, shall, notwithstanding, be liable to indictment for the same misconduct, if it be an indictable offence; but the court before which a conviction shall be had on such indictment, shall take into consideration the punishment before inflicted in forming its sentence.

Sec. 27. If the defendant against whom an attachment shall have been issued and returned served, do not appear on the return day thereof, the court may either award another attachment, or may order the bond taken on the arrest to be prosecuted, or both.^(t)

Sec. 28. Such order shall operate as an assignment of the bond to any aggrieved party who shall be authorized by the court to prosecute the same, and such party may maintain an action thereon in his own name, as assignee of the sheriff or officer to whom the same was given, in the same manner as in other actions on bonds, with condition to perform covenants other than for the payment of money.

Sec. 29. The measure of the damages to be assessed in such action shall be the extent of the loss or injury sustained by such aggrieved party, by reason of the misconduct for which the attachment was issued, and his costs and expenses in prosecuting such attachment.

Sec. 30. If there be no party aggrieved by the misconduct for which the attachment was issued, the court, in case the defendant shall fail to appear, according to the condition of the bond taken on the arrest, shall order the same to be prosecuted by the attorney-general or by the district attorney of the county in which the bond was taken, in the name of the officer who took such bond.

Sec. 31. In such case the whole penalty of the bond shall be forfeited and recovered, and from the moneys collected thereon the court shall order such sum to be paid to the party prosecuting the attachment, as the court ordering the prosecution shall think proper to satisfy the costs and expenses incurred by him, and to compensate him for any injury he may have sustained by the misconduct for which such attachment was issued; and the residue of such moneys shall be paid into the treasury of this state.^(u)

Sec. 32. If, on the return of executions duly issued upon any judgment obtained on such bond, it shall appear that the sureties taken therein were, at the time of taking them, insufficient, and that the officer receiving them had reasonable grounds to doubt their sufficiency, he shall be liable in an action on the case to the party aggrieved, who may have prosecuted such suit, for the amount of the judgment recovered by him, and for his costs and expenses in such suit; or if such suit was brought by the attorney-general, or a district attorney, an action on the case may in like manner be brought by them, in the name of the people of this state, for the amount of the judgment so recovered; and the same disposition of the moneys collected in such action on the case against such officer, shall be made as directed in the last section.

(t) 2 R. S. 539; 4th ed. 772.

(u) 2 R. S. 539.

An attachment against a witness for disobedience of a subpoena, requiring the sheriff to arrest the witness and bring him before the surrogate, "to testify" in a matter pending before him, is wholly void. The surrogate has not any power to issue such process, and he will be liable in an action for false imprisonment for issuing a subsequent attachment against the sheriff for not executing and returning such process, if the latter be arrested on the latter attachment. A witness may be arrested and punished for a contemptuous refusal to appear and give evidence, but the law does not authorize his being brought into court forcibly to testify in any case whatever.^(v)

In *Doran v. Dempsey*,^(w) it was declared that when a decree has been made by the surrogate, directing the payment of money by an executor or administrator, and the party in interest, on a certificate of the decree docketed with the county clerk, having issued an execution which has been returned unsatisfied, then applies to the surrogate for an attachment, and the executor or administrator on the return of the order to show cause, sets up his inability to pay, unless it appear that the debt was fraudulently contracted, or that the party against whom the decree was made, wilfully retains possession of funds or assets still in his hands, or refuses to pay when he has the means of doing so, the attachment will not be issued. And that if inability to pay be alleged as the ground of non-compliance with the decree, the executor or administrator should submit to an examination as to his property, and consent to the application of his choses in action to the payment of the decree as conditions or terms of relief. By this rule the debt, legacy or distributive share due to a creditor, legatee or next of kin, from an executor or administrator, who has squandered the property which has been entrusted to his care, is placed upon the same footing as his honest business debts, which from misfortune he is unable to pay. The act of the 9th May, 1846,^(x) and the Code of Procedure, have established a different rule in respect to such debts, and in all courts of record in this state, a defendant may be arrested and held to bail in an action for money received in a fiduciary capacity,^(y) and after judgment against him and the return of an execution against his property unsatisfied in whole or in part, he may, upon execution against his person, be committed to the jail of the county, until he shall pay the judgment or be discharged according to law.^(z) And in *Seaman v. Duryea*,^(a) the power of the surrogate to attach a guardian for not paying over money belonging to his ward, and to commit him to the common jail of the county, until he should pay such money or until the court should make an order to the contrary, or he should be discharged in due course of law, was declared and sustained. And the views of the court in this case are in several particulars entirely at variance with those of the learned surrogate in *Doran v. Dempsey*. But this question will be more particularly considered hereafter in connection with the subject of the execution of the surrogate's decree upon an accounting of an executor or administrator.

(v) *Perry v. Mitchell*, 5 Denio, 537.

(x) S. L. 1846, ch. 150, p. 164.

(z) Code, secs. 288, 289.

(w) 1 Bradf. Surr. Rep. 490

(y) Code, secs. 179, 183.

(a) 10 Barb. Sup. Ct. Rep. 523.

Of the Surrogate's Power to award Costs.

The above quoted title of the Revised Statutes, concerning Surrogates' Courts, provides as follows:

Sec. 24. [Sec. 10.] In all cases of contest before a Surrogate's Court, such court may award costs to the party in the judgment of the court entitled thereto, to be paid either by the other party personally, or out of the estate which shall be the subject of such controversy.(b)

The law of 1837, contains the following provision:

Sec. 70. In all cases where the surrogate is authorized by law to award costs, he shall tax the costs at the same rate allowed for similar services in the courts of Common Pleas.(c)

These provisions of the statutes will be more fully considered in connection with the subject of costs, in a subsequent chapter of this work.(d)

Of the Completion of Business pending before a Surrogate, on a Vacancy occurring in his Office.

The above mentioned title of the Revised Statutes provides as follows:

Sec. 25. [Sec. 11.] upon the office of any surrogate becoming vacant, his successor shall have power and authority to complete any business that may have been begun, or that was pending before such surrogate.(e)

In the counties of Jefferson, Oneida, St. Lawrence, Oswego, Orange, Chautauque, Cayuga and Tioga, Ulster, Chenango and Sullivan, as has already been seen,(f) provision has been made for the election of a local officer or two local officers, to discharge the duties of county judge and surrogate in their respective counties, in cases of vacancy or inability of such officers or either of them, in pursuance of section fifteen, of article sixth, of the constitution.

Of the Exclusive Jurisdiction of Surrogates with Reference to Each Other.

The above quoted title of the Revised Statutes, concerning Surrogates' Courts, provides as follows:

Sec. 26. [Sec. 12.] When jurisdiction shall have been acquired by any Surrogate's Court, in relation to any matter or proceeding, such jurisdiction over the same matter, and all its incidents, shall be exclusive of all other surrogates, except when otherwise provided by law. And whenever any guardian shall have been appointed, or any other proceeding shall have been commenced, in relation to any other matter in any Surrogate's Court, all other proceedings in relation to such guardian or other matter shall be had and continued in the Surrogate's Court of the same county.(g)

(b) 2 R. S. 223; 4th ed. 422.

(c) S. L. 1837, 536; 2 R. S. (4th ed.) 422, sec. 22.

(d) *Post*, ch. 15.

(f) *Ante*, p.

(e) 2 R. S. 223; 4th ed. 422.

(g) 2 R. S. 223; 4th ed. 422.

Of the Fees of Surrogates, and of their Duties in respect to accounting for the Same.

The constitution, article 6, section 20, as has been seen, prohibits any judicial officer, except justices of the peace, from receiving to his own use any fees or perquisites of office. The legislature, as has been seen, ^(h) has made provision for the compensation of surrogates, to be determined by the Boards of Supervisors of the several counties, and to be paid out of the respective county treasuries. The fees to be allowed and received for services done or performed by surrogates, are fixed by the act of May 7, 1844. The tariff thereby established will be found at length in the appendix to this volume. The legislature has also enacted the following provisions respecting the collection of such fees, and the accounts to be rendered by surrogates therefor.

The "act to provide for the payment of certain expenses of government, to fix the salaries of certain judicial and other officers, and for other purposes," passed May 12, 1847, ⁽ⁱ⁾ having provided for the compensation of county judges, separate officers elected to perform the duties of the office of surrogate, and local officers elected to discharge the duties of county judge and surrogate, further provides as follows:

Sec. 8. All county officers whose compensation is regulated by this act, shall charge and receive from all persons the same fees and perquisites for the performance of any official services performed by them, as might have been charged against any person or persons by any officer or officers in this state, under any law in force, on the thirty-first day of December, eighteen hundred and forty-six, for like official services; and shall also receive all such other fees and perquisites as may hereafter be imposed by law on any person, for services rendered by any such officer in his official capacity. ^(j)

The same act, as amended by the act of March 12, 1849, ^(k) further provides as follows:

Sec. 9. Such county officers shall in no case perform any official services, unless upon prepayment of the fees and perquisites imposed by law upon any person for services rendered by such officer in his official capacity, and upon such payment it shall be the duty of any officer to perform the services required. They shall also pay over all sums so received by them for such fees and perquisites, after deducting their salaries, to the treasurers of the respective counties, on the first Monday of May and November of each year. Also, to render an account giving each item of fees received, verified by their affidavit to the Board of Supervisors at their annual meeting of each year. ^(l)

The same act of May 12, 1847, further provides as follows:

Sec. 11. Whenever any public officer is or shall be required by law to keep an account of, or pay over to any county treasurer or to the state treasurer the fees of his office, such fees shall be deemed to include all fees which such officer shall be entitled to receive for any act or duty done by him in his official capacity, whether such act or duty pertains to his office or the business thereof, or not. ^(m)

(h) *Act*, p. 16.

(j) 1 R. S. (4th ed.) 713, sec. 7.

(i) 1 R. S. (4th ed.) 713, sec. 8.

(g) S. L. 1847, ch. 277, p. 309.

(k) S. L. 1849, ch. 95, p. 135.

(m) S. L. 1847, 313; 1 R. S. (4th ed.) 713, sec. 9.

In the counties of Jefferson, Oneida, St. Lawrence, Oswego, Orange, Chautauque, Cayuga and Tioga, all fees received by the local officers, or two local officers, authorized to be elected by the act of April 10, 1849, as herein above recited,⁽ⁿ⁾ for discharging any of the duties under the act, are to be paid to the county treasurer of their respective counties, to be applied towards the payment of county charges.^(o)

And the same provision is made by the act to authorize the election of a local officer to discharge the duties of county judge and surrogate in the county of Sullivan, passed March 28, 1854,^(p) with respect to the fees received by him for discharging any of the duties under that act.

In the counties of Ulster and Chenango, the above quoted provisions of the law of May 12, 1847, as amended, apply to the local officers authorized to be elected as herein above recited,^(q) in those counties respectively.^(r)

In the county of New York, by the first section of the "act in relation to the fees and compensation of certain officers in the city and county of New York," passed December 10, 1847, all the fees, perquisites and emoluments of the surrogate, or which the surrogate is or may hereafter by law be permitted or entitled to take by virtue of his office, for all official services whatsoever rendered by him, belong to and are for the benefit of the city and county of New York, and are to be collected by him and accounted for and paid over into the treasury of said city and county, as afterwards provided in and by the act; and in lieu of such fees, perquisites and emoluments, there is to be paid to the surrogate the salary allowed by the act, as herein above recited,^(s) and no other salary or compensation whatever.^(t)

By the ninth section of the same act, the surrogate is required as has been seen,^(u) to keep an exact account in a book to be provided for that purpose, of all fees, perquisites and emoluments actually received by him or his assistants, in his or their official capacity, and of all fees, perquisites and emoluments, which he shall be entitled to demand and receive from any person for any service rendered by him in his official capacity; such books to show when and for whom every such service shall have been performed, its nature and the fees chargeable therefor.

The tenth section of the same act, provides that a transcript of such accounts to be made in such form as shall be prescribed by the comptroller of the city and county of New York, shall be transmitted by the surrogate for each calendar month, and within ten days from the expiration thereof, to the comptroller of said city and county, which shall be verified by the oath of the surrogate or by his assistants, which transcript shall contain a statement of all moneys received by such surrogate for fees, perquisites and emoluments, for services done by him or his assistants in his or their official capacity, by virtue of any law of this state, since making the last preceding transcript and return, specifying the total amount received from each person and the name of each person; and also a statement of the fees, perquisites and emol-

(n) *Ante*, p. 10.

(o) S. L. 1849, 437; 1 R. S. (4th ed.) 314, sec. 20.

(p) S. L. 1854, 169; *Ante*, p. 11.

(r) S. L. 1850, 1851, 1852; 1 R. S. (4th ed.) 315, secs. 25, 30.

(s) S. L. 1847, ch. 432, p. 560; 1 R. S. (4th ed.) sec. 201.

(q) *Ante*, p. 11.

(s) *Ante*, p. 71.

(u) *Ante*, p. 26.

uments which such surrogate or his assistants shall be entitled to demand from any person for services rendered in his or their official capacity, by virtue of any law of this state since making the last preceding return, which shall have been made by such surrogate, specifying the amounts chargeable to such person, the names of such persons and the character of the service rendered; and that the verification of every account so transmitted to such comptroller shall be positive, and not upon information or belief.(v)

The twelfth section provides, that any officer referred to in the act, (including the surrogate,) who shall receive to his own use or neglect to account for, in such mode as the Board of Supervisors of the city and county of New York may direct, any fees, perquisites or emoluments by the act declared to belong to and be for the benefit of the city and county of New York, or shall neglect to render to the said comptroller an account of the fees accruing at his office, or to pay over the same, as herein required, shall be deemed guilty of a misdemeanor, and punishable with a fine of not less than five hundred dollars nor exceeding five thousand dollars, or imprisonment in the penitentiary, for a period not less than three months nor exceeding one year, or both, at the discretion of the court before whom said officer may be convicted, and in addition shall forfeit any sum that may be due to him on account of his salary, and shall be liable to the said city and county in a civil action for all moneys so received, and not accounted for and paid over into the treasury of said city and county, pursuant to the requirements of the act.(w)

By the second section of the "act in relation to the assistants appointed by the surrogate of the city and county of New York," passed April 8, 1850, above quoted,(x) authorizing such assistants to administer and certify oaths and affirmations, the same fees are to be collected for services performed under the act, as the said surrogate is authorized to collect for such services when performed by him, and are to be in the same manner accounted for by him, and paid over into the treasury of said city and county.(y)

By the fifth section of the act "respecting the fees of surrogates," passed May 7, 1844, each surrogate is required annually, between the first and twentieth day of January in each year, to make a report under oath and transmit the same to the secretary of state, without expense to the state, of all his fees received or charged during the year then next preceding, stating therein the gross amount in every case where the law gives him a gross sum; and in all other cases stating particularly every item thereof, and showing a full and accurate account of all fees received or charged arising from said office for said year, and also stating the items and amount of his disbursements.(z)

It is proper to state here, that it is provided by law that no fee shall be taken by any surrogate in any case, when it shall appear to him by the oath of the party applying for letters testamentary or of adminis-

(v) S. L. 1847, Vol. II, 562, 563; 1 R. S. (4th ed.) 709, sec. 212.

(w) 1 R. S. (4th ed.) 709, sec. 214.

(y) S. L. 1850, ch. 201, p. 384; 1 R. S. (4th ed.) 708, sec. 210.

(z) S. L. 1844, p. 448; 2 R. S. (4th ed.) 422, sec. 29.

(x) *Ante*, p. 14.

tration, that the goods, chattels and credits do not exceed the value of fifty dollars.(a)

It may also be stated, that by an act of the legislature of the 18th April, 1843,(b) surrogates were required upon the written request of the person or persons liable to pay the same, to procure their bills for fees and charges to be taxed by the first judge of the county courts, or by some other officer authorized to tax bills of costs in the Supreme Court, residing in the county with such surrogate. It is, perhaps, a matter of some doubt in view of the later legislation on the subject of costs, how far this provision is still applicable.

Of the Cases in which the Surrogate is disabled from acting, and of the supplying his Place in such Cases.

The first title of the third chapter of the third part of the Revised Statutes, containing general provisions concerning courts of justice,(c) enacts as follows:

Sec. 2. No judge of any court can sit as such, in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties.

The third article of title second of chapter sixth of part second of the Revised Statutes, relating to letters testamentary and of administration, provides as follows:

Sec. 60. [Sec. 48.] No surrogate shall admit to probate any will, or grant letters testamentary or of administration in any case or upon any estate, where he shall be interested as next of kin of the deceased, or as a legatee or devisee under such will, or where such surrogate shall be named as executor or trustee in such will, or shall be a witness thereto.(d)

The above mentioned first title of the third chapter of the third part of the Revised Statutes, as amended by the sixth section of the act of 7th May, 1844,(e) further enacts that the provisions of the above quoted second section of the same title shall not apply to Surrogates' Courts, except in the cases enumerated in the above section forty-eight [60] of article third of title second of chapter sixth of part second, relating to letters testamentary and of administration, unless an objection shall be taken on behalf of the parties interested at the first hearing or proceedings before the surrogate, on account of such surrogate being disqualified by virtue of the said second section.(f)

It has been held, also, that the statute does not apply to cases where the relative of the judge has no personal interest in the subject matter of the litigation. A surrogate, therefore, for instance, may appoint a guardian for an infant, although such surrogate is a relative of the person who is appointed guardian(g).

The act "in relation to the judiciary," passed May 12, 1847, provides as follows:

(a) S. L. 1844, 447, 448; 2 R. S. (4th ed.) 831, sec. 14.

(b) S. L. 1843, ch. 205.

(c) Tit. I, chap. 3, part 3, 2 R. S. 274; 4th ed. 463.

(d) 2 R. S. 79; 4th ed. 265.

(e) S. L. 1844, ch. 300, p. 448.

(f) 2 R. S. 276; 4th ed. 465, sec. 24, (sec. 14.)

(g) *Underhill v. Dennis*, 9 Paige, 202. See also, *In the Matter of Lopper*, 5 Paige, 489.

Sec. 81. No judge of any court shall have a voice in the decision of any cause in which he has been counsel, attorney or solicitor, or in the subject matter of which he is interested.^(h)

With respect to supplying the place of the surrogate in cases of disability, the same act as amended by the act of December 14, 1847, provides as follows:

Sec. 32. Whenever any surrogate of any county shall be precluded from acting as such in any case by reason of interest, relationship, by consanguinity or affinity to any party interested therein, so that he would be excluded from being a juror, or by reason of being a witness to any will, or of having acted as counsel in any cause, and there shall be no local officer in such county to discharge the duties of such surrogate, or where such local officer shall also be incapable of acting as such surrogate, by reason of the foregoing disabilities in the case of the surrogate, the county judge of such county, or in case of his disability for like cause, then the district attorney of such county, shall possess the power and exercise the jurisdiction in all respects in such case as the surrogate of such county would be authorized to possess and exercise, were it not for such disability.⁽ⁱ⁾

This statute, it is apprehended, makes provision applicable to every county of the state except New York, for supplying the place of the surrogate in all cases of disabilities, and supersedes all the previous acts having the same object. Those acts are, however, probably still in force with reference to the surrogate of the county of New York, and for this reason as well as for the sake of completeness, it is deemed advisable to give them a place in these pages. They are as follows:

When any surrogate who would otherwise be authorized to act, shall be so precluded from acting, (by virtue of sec. 60, [sec. 48,] 2 R. S. 79, above quoted,) or shall be so precluded from acting by reason of any of the provisions of section second of title first of chapter third of part third of the Revised Statutes, upon a representation and due proof thereof, to the first judge of such county, such judge shall be vested with all the powers and authority of the surrogate, in relation to the proof of any such will, and the granting of letters testamentary or of administration thereon, and the granting of letters of administration in case of intestacy; and shall retain jurisdiction in such cases, for all the purposes contemplated by this chapter.^(j)

When the office of surrogate in any county shall be vacant, the first judge of the county shall act as surrogate until such vacancy be supplied.^(k)

Whenever the first judge of any county shall act as surrogate, pursuant to the foregoing provisions, he shall possess all the powers and authority of a surrogate, in the same manner, under the same restrictions as are herein prescribed in relation to such surrogate; and his orders and decrees shall in like manner be subject to appeal.^(l)

Whenever it becomes necessary for the first judge to use a seal in

(h) S. L. 1847, Vol. I, 346; 2 R. S. (4th ed.) 463, sec. 8.

(i) S. L. 1847, Vol. II, 643, 644; 2 R. S. (4th ed.) 265, sec. 63.

(j) 2 R. S. 79; 4th ed. 265, sec. 61, (sec. 49,) as amended; S. L. 1843, ch. 121, p. 108.

(k) 2 R. S. 79; 4th ed. 265, 266, sec. 64, (sec. 50.)

(l) 2 R. S. 79; 4th ed. 266, sec. 66, (sec. 51.)

the execution of any of his duties or powers as surrogate, he shall be authorized to use the seal of the Court of Common Pleas of his county without any charge therefor. All papers, vouchers and documents received by him, and which are required to be retained by the surrogate, shall be deposited in the office of the clerk of the county.(m)

Whenever it becomes necessary for the first judge of any county to act as surrogate thereof, by reason of a vacancy in the office of surrogate, he shall use the seal of the Surrogate Court of said county, and shall file in the said surrogate office, all papers, vouchers and documents received by him, and which are required to be retained by the surrogate.(n)

Whenever any will, letters testamentary or of administration, shall be entitled or required by law to be recorded by such first judge, acting as surrogate, he shall record the same in the books kept for that purpose by the surrogate, and shall sign and certify the same under his own hand.(o)

The same causes which preclude the surrogate from acting, shall apply equally to the first judge, and when both shall be thus incapable of acting, and when the office of both shall be vacant, the district attorney of the county, if not incapacitated by the same causes, shall have the same powers as are given by the preceding sections to the first judge, and shall proceed in the same manner; where there shall be no persons capable of acting under the provisions of this title, the Chancellor, upon petition, shall issue a commission to some suitable person, empowering him to act as surrogate in the premises.(p)

In the county of New York, as has been seen, there is not a county judge within the description of the above quoted law, of the 12th May, 1847.(q) The above provision of that law, for supplying the place of the surrogate in case of disability, therefore, does not apply to that county. Previously to the law of 1847, the first judge of the county courts of the city and county of New York, was the first judge of the Court of Common Pleas of the city and county.(r) By the seventh section of the act of the 12th May, 1847, "in relation to the Superior Court and the Court of Common Pleas, in and for the city and county of New York," it was provided that the judges of the Court of Common Pleas, thereby authorized to be elected, should have and possess the same powers, and perform the same duties, as the first judge and assistant judges of said Court of Common Pleas, then had and possessed and performed.(s) The sixth section of the same act provides for the selection of the first judge. The above sections of the statutes, authorizing the first judge to discharge the duties of the surrogate, in case of his disability, are, therefore, it would seem, applicable to the case of a disability, on the part of the surrogate of the county of New York.

So far as the sections of the statutes are still in force, with reference to

(m) 2 R. S. 79; 4th ed. 266, sec. 67, (sec. 52.)

(n) S. L. 1837, ch. 465, p. 543, sec. 1; 2 R. S. 79; 4th ed. 266, sec. 68.

(o) 2 R. S. 80; 4th ed. 266, sec. 70, (sec. 53.)

(p) 2 R. S. 80; 4th ed. 266, sec. 71, (sec. 54.)

(q) Constitution, art. 6, sec. 14; *Anie*, p.

(r) 2 R. S. 215, sec. 22, 23; 3d ed. p. 284.

(s) S. L. 1847, Vol. I, ch. 255, p. 279.

the other counties, the county judge is to be understood as the officer intended, when the first judge of the county is mentioned, and the county court as the court intended, where the Court of Common Pleas is mentioned, and for all the counties, the Supreme Court is to be understood, where the Chancellor is mentioned.(t)

Prohibitions to which Surrogates, their Clerks, Law Partners, &c., are Subject.

On this topic, the following statutory provisions are applicable to surrogates and Surrogates' Courts.

No judge can practice, or act as a counsellor, solicitor or attorney, in the court of which he is a judge.(u)

No judge shall have any partner, practicing in the court of which he is a judge; nor shall any judge be directly or indirectly interested in the costs of any suit, that shall be brought in the court of which he is a judge.(v)

No judge shall directly or indirectly, take any part in the decision of any cause or question, which shall be brought or defended in the court of which he is a judge, by any person acting as an attorney or counsellor with whom he shall be interested or connected as a partner in any other court.(w)

No county judge shall practice or act as an attorney, solicitor or counsellor, in any court of which he shall be, or shall be entitled to act as a member; nor shall any partner of, or person connected in law business with any such judge, practice or act as an attorney, solicitor or counsellor, in any court of which such judge shall be, or shall be entitled to act as a member, or in any cause or proceeding originating in such court; nor shall any such judge practice, or act as a counsellor, in any cause or proceeding which shall have originated in a court of which he shall be, or shall be entitled to act as a member.(x)

No partner or clerk of any judge or officer, shall practice before him, as attorney, solicitor or counsel in any cause or proceeding whatever, or be employed in any suit or proceeding, which shall originate before such judge or officer; nor shall any judge or officer, act as attorney, solicitor or counsellor in any suit or proceeding which shall have been before him in his official character.(y)

No judge, commissioner or other judicial officer, shall demand or receive any fees or other compensation, for giving his advice in any matter or thing, pending before such judge or officer, or which he has

(t) See "act in relation to the judiciary," S. L. 1847, Vol. I, 280, sec. 16, and act amending the same; S. L. 1847, Vol. II, 638, sec. 27; 2 R. S. 4th ed. 362, sec. 1; 4th ed. 385, sec. 24; Code of Procedure, sec. 29. In the view above given of the present force of the sections of the statutes in question, it is supposed that a slight inaccuracy occurs in the fourth edition of the Revised Statutes, in substituting in those sections the county judge in the place of the first judge of the county, and the county court in the place of the Court of Common Pleas, as applicable to all the counties of the state.

(u) 2 R. S. 275; 4th ed. 463, sec. 4.

(v) *Ib.*, sec. 5.

(w) S. L. 1839, ch. 303, p. 281, as amended; S. L. 1841, ch. 272, p. 255; 2 R. S. 275; 4th ed. 463, sec. 7.

(x) S. L. 1847, Vol. II, 647, sec. 48; 2 R. S. (4th ed.) 464, sec. 10.

(y) S. L. 1847, Vol. II, 648, sec. 52; 2 R. S. (4th ed.) 464, sec. 13.

reason to believe, will be brought before him for decision; or for drafting or preparing any papers or other proceedings, relating to any such matter or thing, except in those cases where fees are expressly given by law to such judge or officer, for services performed by him.(z)

No surrogate shall be counsel, solicitor or attorney, for or against any executor, administrator, guardian or minor, in any civil action, over whom or whose accounts he could have any jurisdiction by law.(a)

No son, partner or clerk of any surrogate, shall be permitted to practice before such surrogate, as attorney, solicitor or counsel for any party to any proceeding before him.(b)

No surrogate shall practice or act as an attorney, counsellor or solicitor in his court, nor in any cause originating in such court; nor shall any partner of, or person connected in law business with any surrogate, practice or act as attorney, solicitor or counsellor in any cause or proceeding before such surrogate, or originating before such surrogate.(c)

Other particulars and incidents of the powers, duties and liabilities of surrogates, will appear in the following pages, in connection with the various subjects within their cognizance and jurisdiction embraced within the scope of this work.

(z) 2 R. S. 275; 4th ed. 464, sec. 14, (sec. 6.)

(a) 2 R. S. 223; 4th ed. 422, sec. 27, (sec. 13.)

(b) S. L. 1844, ch. 300, p. 448, sec. 4; 2 R. S. (3d ed.) 322, sec. 28.

(c) S. L. 1847, Vol. II, 647, sec. 51; 2 R. S. (4th ed.) 422, sec. 28.

CHAPTER II.

OF PROVING WILLS.

It should be understood, at the outset of this chapter, that a will proved in the Surrogate's Court is conclusive as to the personal estate only of the testator. Although, as will presently appear, a will may be proved in the Surrogate's Court as to real as well as personal estate, still the surrogate's record of the proof with respect to the real estate of the testator can be received in evidence, and is as effectual only as the original will would be if produced and proved, and may in like manner be repelled by contrary proof.(a) On the other hand, the probate of any will of personal property taken by a surrogate having jurisdiction, is conclusive evidence of the validity of such will until such probate be reversed on appeal, or revoked by the surrogate on allegations as directed by the statute, or the will be declared void by a competent tribunal.(b) The principal subject of the present chapter, therefore, will be the proving of wills of personal property. In connection with that subject, however, the partial and inconclusive jurisdiction of surrogates with respect to the proof of wills of real estate, and the mode of proceeding on taking such proof, will be fully considered and explained.

Of the Origin of Wills of Personal Property.

The power of bequeathing is coeval with the first rudiments of the English law; for we have no traces or memorials of any time when it did not exist.(c) The principle has been declared in the highest court of this state, that the right of testamentary bequest is not, as some great jurists maintain, a mere institution of positive law, but a natural right, subject to the restrictions and regulations of civil legislation, yet not its mere creature.(d)

In England, till modern times, by the general law of the land or by custom in particular places, a man could dispose of only one-third of his movables from his wife and children; and in general no will was permitted of lands till the reign of Henry the Eighth, and then only of a certain portion; for it was not till after the restoration that the power of devising real property became so universal as at present.(e) This law as regards movables is at present altered by imperceptible degrees,

(a) 2 R. S. 58; 4th ed. 242, sec. 11, (Sec. 15;) *Jauncey v. Thorne*, 2 Barb. Chan. Rep. 40, 51; *Bogardus v. Clarke*, 1 Ed. Ch. Rep. 266.

(b) 2 R. S. 61; 4th ed. 244, sec. 21, (sec. 29.)

(c) 2 Black. Comm. 491.

(d) *Stewart's Executor v. Lispenard*, 26 Wendell's Rep. 296; *Remsen v. Brinckerhoff*, Id. 333, per Verplanck, Senator.

(e) 2 Black. Comm. 12; 1 Wms. on Exrs. 1, 2; *Tonnelo v. Hall*, 4 Comst. 145.

and the deceased may now by will bequeath the whole of his goods and chattels. All those embarrassments which formerly checked the testamentary disposition of property in England, have been effectually removed in this state, and the power of devising and bequeathing one's estate is here enjoyed in the fulness and perfection of the absolute right.^(f) The only limitation which would seem to exist is that supposed to be created by implication, by the laws commonly known as the exemption laws, providing that when a man having a family shall die, leaving a widow or a minor child or children, certain spinning wheels, weaving looms, domestic animals, farming utensils, household furniture, &c., shall not be deemed assets, but shall remain in the possession of the family of the deceased, and in addition thereto other personal property to the value of not exceeding one hundred and fifty dollars.^(g) But these provisions, if they apply otherwise than as against creditors, which may perhaps be doubted, are altogether too inconsiderable in their effect to be regarded seriously as a restraint upon bequests in this state.

Of the Nature and Incidents of Wills and Codicils.

A last will and testament is defined to be "the just sentence of our will touching what we would have done after our death."^(h) When the will operates upon personal property it is sometimes called a *testament*, and when upon real estate a *devise*; but the more general, and the more popular denomination of the instrument, embracing equally real and personal estate, is that of last will and testament.⁽ⁱ⁾

A last will and testament with respect to personal property will operate upon whatever personal estate a man dies possessed of, whether acquired before or since the execution of the instrument.^(j) With respect to real estate formerly, upon the principle that a devise of lands is merely a species of conveyance, being considered by the courts not so much in the nature of a testament as of a conveyance by way of appointment, of particular lands to a particular devisee, it was established that a man could devise those lands only which he had at the time of the date of such conveyance, and no after-purchased lands would pass,

(f) See 2 Kent's Com. 327, 8.

(g) 2 R. S. 83; 4th ed. 269, secs. 9, 10, 11; S. L. 1842, chap. 157, p. 193.

(h) Swinb. part 1, sec. 2; Godolph, part 1, ch. 1, sec. 2; 2 Black. Comm. 499; 1 Williams on the Law of Executors and Administrators, 6.

(i) 4 Kent Comm. 501. It is said by Lord Coke, (Co. Lit. 111 a,) that in law most commonly *ultima voluntas in scriptis* is used, where lands or tenements are devised, and *testamentum*, when it concerneth chattels: See also to the same effect, Godolph, part 1, ch. 6, sec. 7.

"So also the word *devise* seemeth properly applicable to lands; *bequest*, *bequeath*, *give*, *dispose*, and such like, to goods: yet, forasmuch as authors do generally confound them, and because that propriety of expression is not so much regarded in wills as in other legal instruments of conveyance, so long as the testator's intention doth sufficiently appear; therefore it hath not been thought necessary, in these different ways of expression, to observe a scrupulous exactness. The word *legacy*, in its ordinary signification, is applied to money; but it may signify a devise of land, and land may pass thereby," Doug. 39.

(j) 2 Black Comm. 378, 9; 1 Wms. on Exrs. 6; *Collin v. Collin*, 1 Barb. Ch. Rep. 630.

whatever words might be used.^(k) The Revised Statutes altered the language of the law in this particular, and made the devises prospective. They declare as follows:

Sec. 2. Every estate and interest in real property descendible to heirs may be devised.^(l)

Sec. 35. Expectant estates are descendible, devisable and alienable in the same manner as estates in possession.^(m)

Sec. 5. Every will that shall be made by a testator in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death.⁽ⁿ⁾

This last statutory provision, it is laid down, proceeds upon the ground that in a general devise of all his real estate, the testator has reference to the real estate as it shall exist at the time of his death; and that such a construction of the testamentary disposition of his property will be but carrying his intention into effect. Upon the same principle, therefore, if he devises all the real estate of a particular description, of which he shall die possessed, or which shall belong to him in a particular town or county, at the time of his death, although the devise would not be within the words of this section, it not being a general devise of all his real estate, still it is thought it would clearly be within the spirit and intent of this statutory provision. Where, however, the

(k) 2 Black Comm. 378; 4 Kent's Comm. 510, 1 Wms. on Exrs. 6, 181; *Adams v. Winne*, 7 Paige, 100, per Walworth Ch. See, also, *Post*; *Pond v. Bergh*, 10 Paige 141; *Ellison v. Miller*, 11 Barb. Sup. Ct. Rep. 332. The recent statute 1 Victoria, ch. 26, sec. 24, has changed the rule of law upon this subject in England entirely, by providing that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

(l) 2 R. S. 57, 4th ed. 241. See *Varick v. Jackson*, 2 Wend. 166; *Pond v. Bergh*, 10 Paige, 141.

Sec. 3. Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise, 2 R. S. 57. See *McCartee v. Orphan Asylum Society*, 9 Cowen, 437; *Theol. Sem. of Auburn v. Childs*, 4 Paige, 419; *Ayres v. Methodist Ch.*, 3 Sandf. Sup. Ct. Rep. 351. See, also, the act "authorizing certain trusts," passed May 14, 1840; S. L. 1840, 267, and the act in addition thereto, passed May 26, 1841; S. L. 1841, 245; also act to amend last mentioned act, passed April 21, 1846; S. L. 1846, ch. 74, p. 76; 2 R. S. (4th ed.) pp. 137, 138; *Taylor's Precedents of Wills*, 68, 156.

Sec. 4. Every devise of any interest in real property to a person who, at the time of the death of the testator, shall be an alien, not authorized by statute to hold real estate shall be void. The interest so devised shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his will to the residuary devisees therein named, if any there be competent to take such interest, 2 R. S. 57; 4th ed. Vol. II, 241. See, also, sec. 8, 1 R. S. 719; 4th ed. Vol. II, 126, secs. 15, 16, 17, 18, 19 and 20; Id. 720, 721; 4th ed. Vol. II, 128; the "act to enable resident aliens to hold and convey real estate," passed April 10, 1843, S. L. 1843, 62; 2 R. S. (4th ed.) 129; the "act to enable resident aliens to hold and convey real estate, and for other purposes," passed April 30, 1845, S. L. 1845, 94; 2 R. S. (4th ed.) 126, 129, 130, 131; *Jackson v. Green*, 7 Wen. 333; *Jackson v. Fitz Simmons*, 10 Id. 9; *Mick v. Mick*, 10 Id. 379; *The People v. Irvan*, 21 Id. 128; *The People v. Conklin*, 2 Hill, 67; *Orser and others v. Hoag*, 3 Id. 79; *West v. West*, 8 Paige, 433; *Brown v. Sprague*, 5 Denio, 645. See, also, *Van Kleeck v. Dutch Church of New York*, 20 Wend. 457; *Van Cortlandt v. Kip*, 1 Hill, 590.

(m) 1 R. S. 725, 2 R. S. (4th ed.) 134.

(n) 2 R. S. 57, (4th ed.) 241. See *Van Kleeck v. Dutch Church of New York*, 20 Wend. 457; *Van Cortlandt v. Kip*, 1 Hill, 590.

testator devises all his real estate at a particular place, or within a particular district of country, there is good reason to suppose he means to speak in reference to the lands he has already acquired there; and that if he intended to give to the devisee all the lands or real estate which he should afterwards purchase at that place, or within the specified district of country, there would have been something in his will indicating such an intention. Thus in *Pond v. Bergh*,^(o) where P. D., owning certain lands in the county of Schoharie, made his will about nine years before the death of his uncle, from whom he derived certain other five parcels of land in the same county, by which will, in distributing his real and personal estate among his children and grandchildren, he gave to his four sons all his real estate lying and being in the county of Schoharie, subject to the payment of certain legacies to his other children and descendants, it was held that he must have had reference to the real estate in that county which then belonged to him, or in which he had some right or interest; and not such as he should acquire afterwards by purchase or devise, or by descent from others, and that, therefore, all his children and grandchildren were entitled to participate in the five parcels of land in which he acquired an interest as one of the heirs at law of his uncle. In *Havens v. Havens*,^(p) the words of the will were, "all the rest, residue and remainder of my estate, in case it shall more than suffice to pay the legacies hereinabove and hereinafter given, I bequeath," &c. The testator devised specifically all the real estate which he had at the date of the will, and there was after-purchased land. It was held that the will did not in express terms dispose of all the testator's real estate, nor were there terms which denoted his intent to devise all his real property within the meaning of the statute, and consequently that the real estate acquired by the testator after the making of his will did not pass under this residuary bequest, but descended to his heirs at law subject to the dower of his widow.

Where the testator owning certain lands, by his will executed previously to the Revised Statutes, devised the use of all his real estate to his wife during her widowhood, and in 1831, after the Revised Statutes took effect, became seised of other lands, by purchase, and died in 1833 without having altered or republished his will; it was held that the lands acquired in 1831 did not pass to the widow under the will, but descended to the heirs at law of the testator.^(q)

With respect to codicils, in strictness, according to the older authorities of the ecclesiastical law, the appointment of an executor was essential to a testament, and the term codicil was applied to those instruments which expressed the intentions of the party touching that which he would have done after his death *without the appointing of an executor*. But this strictness has long since ceased to exist, and a codicil may now be defined to be a supplement or an addition to a will, made by the testator to be annexed to and taken as part of the will itself, being

(o) 10 Paige, 140.

(p) 1 Sand. Ch. Rep. 324.

(q) *Elison v. Miller*, 11 Barb. Sup. Ct. Repta. 332.

for its explanation or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator.(r)

A codicil, in this latter sense of it, is part of the will, all making but one testament. It has the effect, and independently of any intention to bring down the will to the date of the codicil, making the will speak as of that date, unless a contrary intention be shown, in which case it will repel that effect. And this is so, whether the immediate subject of the codicil be real or personal property. The codicil may be written on the same paper, or affixed to, or folded up with the will; or it may be written on a different paper, and deposited in a different place. Physical annexation or connection is not absolutely requisite. Internal annexation, as it is termed in the cases; that is, constructively by reference to the previous will or its provisions, is held to be as effectual and inseparable an annexation as if made by a wafer or wrapper.(s)

A testator, though he can make only one will which can take effect, (as there can be but one *last* will,) may make as many codicils as he pleases, and the first is of equal force with the last, if not contradictory to each other.(t)

With this exception, the laws which regulate codicils agree, in general, with those which regulate wills. They must be executed, published and attested, and proved exactly in the same manner as a will.

A will as well as a codicil, is, by its nature, in all cases a revocable instrument, even should it in terms be made irrevocable. It may be added that there cannot be a joint or mutual will: an instrument of such a nature being unknown to the testamentary law.(u)

(r) See *Wms. on Executors*, 7-8; *Tol. on Executors*, 5.

(s) *Wms. on Executors*, 8; *Barnes v. Crowe*, 1 Ves. jr. 486; *Van Cortlandt v. Kip*, 1 Hill, 590; *Toll. on Exrs.* 5.

(t) *Godolph.* 1; *Swinb.* 14, 15.

(u) *Wms. on Exrs.* 9-10. But see *Ex parte Day*, 1 Bradf. Surr. Rep. 476; *Ex parte McCormick*, 2 Ib. 169.

The above quotation relative to joint or mutual wills is founded upon the judgment of Sir John Nicholl in the case of *Hobson v. Blackburn*, 1 Addams, 274. Exception is taken to that judgment in the decision of the court in *Ex parte Day*, 1 Bradf. N. Y. Surr. Repts. 476. Upon strict examination, however, it will be found, it is believed, that that judgment is not liable to the objections made against it by the surrogate. The case of two persons making one will containing mutual provisions, it is apprehended, is not in anywise different from that of their making separate wills with the like provisions. Indeed this was one of the principal grounds of the argument in the celebrated *Walpole Case*. See 2 Harg. Exerct. Juris. 101. On the death of the first dier the joint will is proved, not as a joint or mutual will, but as his individual will operative so far as it relates to his property, in the same manner as in the case of a separate will under the circumstances supposed, such will would be proved. No notice is taken of the mutual provisions in the instrument, because they have not anything to do with the matter. The question of mutuality does not occur. On the death of the second dier, if subsequently to the making of the previous instrument, whether a joint will or a separate will containing mutual provisions, he has not made another will, such joint will may perhaps be admitted to probate as his last will, operative so far as it concerns his property, in the same way as, under the like circumstances, the separate will with mutual provisions would be admitted. Here again no question of mutuality arises. But if the second dier has made a subsequent will, the instrument purporting to be a mutual will is revoked and annulled as to him so far as the jurisdiction of the Probate Court is concerned, and such subsequent will must be admitted by the Probate Court as his last and controlling testamentary disposition of his property. Here, of course, all idea of the mutuality of the will or wills as such vanishes. If the terms of the supposed joint will in the same manner as if the terms of the agreement under which separate mutual wills were executed, and the condition and conduct of the parties, and the circumstances of the case, are such as to enable a court of equity to enforce the instrument as a compact with reference to the property of the second

Who is Capable of making a Will.

Sec. 1. All persons, except idiots, persons of unsound mind, married women and infants, may devise their real estate by a last will and testament duly executed, according to the provisions of this title.(v)

(v) Title 1, chap 6, part 2, art. 1st., 2 R. S. 56; 4th ed. 241.

dier, in respect to those particulars wherein he has by his separate last will contravened its provisions, such a court will undoubtedly intercede; but this is not on the ground of a mutual will, but on the ground of compact.

In the case of *Dufour v. Pereira*, 1 Dickens, 419, cited by the surrogate, the subsequent will of Mrs. Rancer, one of the makers of the joint will, had been admitted to probate as her will notwithstanding the previous joint will, and the question was between the parties claiming the personal property under the conflicting provisions of the two instruments. And the Lord Chancellor held, not that the mutual will was valid as such, but that it was a contract between the man and his wife, she holding separate property to her own use, which she having reaped a benefit under it, was not at liberty afterwards to revoke. So far from declaring the mutual will valid as such, he expressly recognizes the validity of the subsequent will of the wife, thereby entirely excluding all idea of mutuality of the first will, and leaving that as the will of the husband alone. "This court," he says, speaking of the subsequent will, "does not set aside the will, but makes the devisee, heir or executor, trustee to perform the contract."

The solid ground upon which the decision of *Dufour v. Pereira* rests, is that the wife had proved the so called mutual will as the will of her husband, and appropriated his property under it to herself according to its terms. This most clearly precluded her from afterwards refusing to perform her part of the agreement or disposing of her property otherwise than pursuant to its provisions. "Consider," says the Lord Chancellor, "how far the mutual will is binding, and whether the accepting of the legacies under it by the survivor is not a confirmation of it. I am of opinion it is." It should be observed that this expression, as well as one or two others which will presently be quoted, seems to have eluded the strict and vigilant search of the learned surrogate.

The supposed argument of Lord Camden, which the surrogate cites with approbation from the elegant and ingenious, but not properly speaking authoritative notes of Mr. Hargrave, that the death of the first decedent leaving the mutual will unrevoked on his part, and without notice of its revocation or a desire or intention to revoke it on the part of the other party, of itself, concludes the survivor, and binds his or her estate to carry out its provisions, can hardly be sustained. Suppose, as might very well and very frequently happen, if mutual wills should become common, that subsequently to the making of the mutual will the property of the one first dying, upon a certain amount or condition of which the mutual will was based, should be destroyed or squandered, or materially diminished, without the knowledge of the other party, or suppose such a change of circumstances to occur after the death of such first decedent, it can hardly be conceived that any court would hold that his mere death bound the estate of the survivor to the terms of the mutual will. But if the survivor proved the will or accepted a legacy under it, upon a very familiar doctrine, he might be held to have precluded himself from afterwards denying its binding force upon himself. And this, after all, is the substance of the case of *Dufour v. Pereira*.

The surrogate, however, citing detached sentences from the notes of Mr. Hargrave, puts the case upon the argument just quoted, that the death of the first dier concluded the survivor. He says, "it is not to be overlooked, that the whole groundwork for Lord Camden's decree in this case, the very foundation of the equity which he administered, was the validity of the mutual will, so far as the deceased husband was concerned, unless revoked; and that having died without revoking it, 'the first dier's will is then irrevocable,' and for the very reason that it is a good and valid will, because irrevocable by death, the other party in equity will be held to stand by her part of the will. How a decision could very well more clearly sustain the validity of a mutual will, unless revoked, it is very difficult to discover." Now Lord Camden, according to the report of the case in 1 Dickens, did not put his decision upon the groundwork and foundation, thus so eloquently ascribed to him. There was sufficient in the case, to bring it fully within the sound, well known and long established principle, which has been adverted to, and it was not at all necessary, that he should resort to any such new notion. Besides the expression to that effect, already quoted from the report in Dickens, Lord Camden further distinctly and emphatically repeats the grounds of his decision as follows: "the defendant, Camilla Rancer, hath taken the benefit

Sec. 18. [Sec. 21.] Every male person of the age of eighteen years or upwards, and every female, not being a married woman, of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate by will in writing.(w)

(w) 2 R. S. 60; 4th ed. 243.

of the bequest in her favor, by the mutual will, and hath proved it as such; she hath thereby certainly confirmed it; and, therefore, I am of opinion, the last will of the wife, so far as it breaks in upon the mutual will, is void. And I declare, that Mrs. Camilla Rancer, having proved the mutual will, after her husband's death, and having possessed all his personal estate, and enjoyed the interest thereof, during her life, hath by those acts bound her assets, to make good all her bequest in the said mutual will; and, therefore, let the necessary accounts be taken." These sentences, which the surrogate also overlooked, plainly disclose what was the real groundwork and foundation of Lord Camden's decision. It is by reference to the principle upon which they proceed, that the disconnected sentences, quoted by the surrogate, are to be interpreted, and they prove, it is respectfully submitted, that there has been some misapprehension in the view which he has taken of the case.

In the case of *Hobson v. Blackburn*, two sisters and a brother jointly executed an instrument, in the nature and terms of a will, and making certain mutual provisions. The brother died first, and the instrument was proved as his will. Afterwards one of the sisters died, having previously made a separate, and different testamentary disposition of her property. Probate of the joint will was prayed by one of the surviving executors named in the joint will, and letters of administration with the will annexed, were prayed by relatives and legatees under the subsequent will. And the judgment of Sir John Nicholl was as follows: "I have no hesitation whatever, in rejecting the allegation, propounding the mutual or conjoint will, as that of the party deceased in this cause, on the principle, that an instrument of this nature is unknown to the testamentary law of this country, or in other words, that it is unknown as a will, to the law of this country at all. It may, for aught that I know, be valid as a compact, it may be operative in equity, to the extent of making the devisees of the will, trustees for performing the deceased's part of the contract. But these are considerations wholly foreign to this court, which looks to the instrument entitled to probate, as the deceased's will, and to that only. The allegation plainly proceeds upon a notion of the irrevocability of the instrument, which it propounds as the will of the deceased. Why this very circumstance destroys its essence as a will, and converts it into a contract; a species of instrument, over which this court has no jurisdiction. Upon these broad, and as I apprehend, sufficiently intelligible grounds, I reject this allegation."

The surrogate remarks as an inconsistency in this judgment, that the same instrument, had nevertheless been admitted to probate by the same court, as the last will and testament of the brother who had died first. But this was not in any sense as a mutual will. The quality of mutuality could not come in question on the occasion of the death of the first decedent. With respect to him, the will was not admitted to probate as a mutual will, any more than where a bond or a marriage settlement, are offered as testamentary, they are admitted to probate respectively as a bond, or a marriage settlement. They are proved and admitted as the will or part of the will, as the case may be, of the testator. In the same way, this paper, purporting to be testamentary in respect to the first decedent, was admitted to probate not as a mutual will, but solely in respect to his property as his last will. Nor as is apparent from what has just been said, is there any such inconsistency as is supposed by the surrogate between this judgment, and the practice which prevails in the ecclesiastical courts, of admitting to probate, as testamentary letters, bonds, marriage settlements and other instruments.

The ruling in the case before the surrogate, instead of being in conflict, was strictly in accordance with *Hobson v. Blackburn*. With respect to the first decedent, no question as to mutuality existed, and it would seem that the rare learning and research arrayed by the surrogate in his written opinion, were very needless for the purposes in hand.

A few words may be added with reference to the validity of an instrument purporting to be a mutual will in respect to the first decedent. It is worthy of notice that all the cases upon mutual wills, so far as the first decedent was concerned, with one exception, have been *ex parte*. In that single exception (*Clayton v. Liverman*, 2 Dev. & Batt. 558,) the instrument was not sustained as a will. And there is much good sense and sound logic in the reasoning of Chief Justice Gaston, delivering the opinion of the court, arriving at the conclusion that a writing executed by two persons, making a joint disposition of all their property, is not a joint will, nor is it a separate one.

The disqualification on the ground of idiocy is founded on the natural incapacity of an idiot to exercise such a degree of understanding as constitutes volition. An idiot or natural fool, is one who has had no understanding from his birth, and is therefore deemed in law (founded on experience) never likely to attain any, for which reason, and to prevent their alienating their estates and disinheriting their heirs, the statute, (x) following the common law, directs that the Chancellor [now the Supreme Court] shall have the care and custody of all idiots, lunatics, &c., and of their real and personal estates, and shall provide for their safe keeping and maintenance, and the maintenance of their families out of their personal property and the rents and profits of their real estate.

He is undoubtedly an idiot, who, notwithstanding he may be of lawful age to make a will, has yet so little sense as to be unable to number to twenty, or to tell his age, or the days of the week, or to know his own father or mother, or to answer any common questions, by which it may plainly appear that he has not sufficient reason to discern what is to his advantage or disadvantage; and who, from want of his natural parts, is incapable of being informed or instructed by any

(x) 2 R. S. 52; 4th ed. 237.

A joint will most certainly does not come within the proper definition of a will. It is not the just sentence of the will of the testator touching what he would have done after his death, but it is a compact between him and another person, expressing their joint intention with reference to their common property. It constitutes a trust in the survivor, over which the law has not any control, and security for the discharge of which the law cannot require. It proceeds upon certain assumptions and conditions, the observance and fulfilment of which, notwithstanding the remedial power of a court of equity, it is absolutely impossible to compel. Take a case which may not be uncommon; a man and his wife each having children by a former marriage, make a joint will leaving all the property of each to the survivor, and upon his or her death the property of both to be divided equally among all the children. This would seem to be a reasonable and just will, and present a fair case for the intervention of a court of equity, if any attempt should be made to contravene its provisions, but in order to give it absolute effect, one condition remains to be complied with, which it is not in the power of any court to enforce. That condition is that the property shall remain to be distributed at the death of the survivor. The whole ultimate object of the instrument may be frustrated by his or her improvidence or misfortune. It is true the intentions of a testator may be disappointed by such causes in any case, but where the chances of such a result flow from a contract manifestly appearing on the face of the supposed testamentary instrument, a court of probate may well hesitate before giving such instrument its approval.

Again, whilst a proper will is revoked or defeated only by the act or will of the testator, a mutual will is liable to be defeated at the option of the survivor. If the survivor refuses to prove the will and accept the legacies under it, the instrument even as to the first decedent is a nullity. There is not any such thing as an administration with the will annexed of such a will. If the survivor refuses to prove the mutual will, the decedent must be held to have died intestate. It is not probably expedient to pursue in a note the obvious train of reasoning which these hypothetical cases suggest. It is sufficient to say that there may be cases even in respect to the first decedent, when a so called mutual will shall be contested by the next of kin, when a court of probate upon grounds having reference to such alleged mutuality, may refuse probate of the instrument. It will be understood that the difficulties here hinted at, equally attend the case of separate mutual wills.

By way of apology for this, perhaps, too extended discussion upon a comparatively unimportant subject, it should be stated in conclusion that the remarks of the learned surrogate in *Ex parte Day* were deemed rather too general and sweeping, and that it was considered of some importance to lay some observations before the reader, which should have a tendency to correct any mistaken impression which that case might be calculated to convey.

other person. Such an idiot cannot at any time make a will or testament, or dispose either of lands or goods.(y)

But a man is not an idiot who has any glimmering of reason, so that he can tell his age, know his parents, and the like.(z) And generally tests founded on the want of knowledge of such matters, though they may be evidences, yet they are too narrow, and conclude not always; for whether idiot or not, is clearly a question of fact, referable to the individual circumstances of each particular case.(a)

Non compos mentis, or of unsound mind, (which means the same thing,) are legal terms of a determinate signification, understood by courts of law, importing not weakness of understanding, but a total deprivation of reason.(b) People, therefore, of mean understanding and capacities, neither of the wise sort nor the foolish, even though they rather incline to the foolish, are not hindered from making their wills.(c) The law will not scrutinize into the depth of a man's capacity, particularly after his death, if he was able to conduct himself reasonably in the common course of life, as it might be opening a wide door to pretensions of fraud.(d) A man's capacity may be limited, his manners eccentric, and he may have many very foolish propensities; but he is not, therefore, excluded from the power of disposing of his property by will.

The degree of mental capacity requisite to the execution of a will, was the subject of protracted and elaborate discussion in the case of *Stewart's Executor v. Lisenard*;(e) and Senator Verplanck, delivering the leading opinion of the court of last resort in that case, declares his views of the question, as follows:

"To establish any standard of intellect or information beyond the possession of reason in its lowest degree, as in itself *essential* to legal capacity, would create endless uncertainty, difficulty and litigation; would shake the security of property, and wrest from the aged and infirm, that authority over their earnings or savings, which is often their best security against injury and neglect. If you throw aside the old common law test of capacity, then proofs of wild speculations or extravagant and peculiar opinions, or of the forgetfulness, or the prejudices of old age, might be sufficient to shake the fairest conveyance, or impeach the most equitable will. The law, therefore, in fixing the standard of positive legal competency, has taken a low standard of capacity; but it is a clear and definite one, and, therefore, wise and safe. It holds, (in the language of the latest English commentator),(f) that 'weak minds differ from strong ones, only in the extent and power of their faculties; but unless they betray a total loss of understanding, or idiocy, or delusion, they cannot properly be considered unsound.'(g)

(y) Burns' Eccles. Law.

(a) 1 Wms. on Exrs. 16.

(b) *Ex parte Barnsley*, 3 Atk. R. 167; 2 Madd. Ch. 569; *Jackson v. King*, 4 Cow. 217. See *Stanton v. Wetherwax*, 16 Barb. S. C. R. 260.

(c) Swinburne, 127, 8.

(e) 26 Wend. 255.

(d) Burns' Eccel. Law.

(f) Shelford on Lunacy, p. 39.

(g) "But," continues Senator Verplanck, "although the weak in intellect, the dull, the stupid, the decayed in mind, do not, and ought not, upon any ground of policy, or right, or authority, to labor under the personal disability of disposing of their property, which the law prescribes as to 'persons of unsound mind,' yet the books abound in cases where the courts,

"The right of testamentary disposition, is regarded as a common and natural right, to be restricted no farther than public policy and the necessary evidence of intent and consent absolutely require. When the testator is shown to possess such a rational capacity as the great majority of men possess, that is sufficient to establish his will: 'when this can be truly predicated, bare execution is sufficient,'^(h) no matter how arbitrary its provisions, or how hard and unequal may be its operation on his family. On the other hand, when a total deprivation of reason is shown, whether from birth, as in idiocy, or from the entire subsequent overthrow of the understanding, whether permanently or existing only at the time of execution, further inquiry is needless; the will is itself a nullity, however just and prudent in its provisions, and with whatever fairness of intention it may have been obtained by well meaning friends. That intermediate class, who fall below the most ordinary standard of sound and healthy minds, whether from the partial disease of one faculty, or the general dulness and torpor of the understanding, are not on that account interdicted from the common rights of citizens, and least of all from that of testamentary disposal. But their defect of intellect may furnish most essential and powerful evidence, in union with other proof, that some particular will or codicil was obtained by fraud and delusion; that it had not the consent of the will and understanding, and was not executed by one, who, in *that respect*, was of a sound and disposing mind and memory. As in the former class of cases, there is a general legal disability, because the party, from total unsoundness of mind and memory, is unable to consent with understanding to any legal act whatever; so, in the latter instances, there may be shown an absence of consent to the particular will, from inability to comprehend its effect and nature."⁽ⁱ⁾

even at common law, have made void the bequests, devises and conveyances of the imbecile. Are such cases contradictory to the conclusions just stated? I think clearly not. They are founded upon a different, but closely allied principle, perfectly reconcilable with the other, and they are both applicable to cases like the present. By the decisions referred to, wills, deeds and contracts have been held void, when made by imbecile persons; but they were so held, not on account of the general and positive disability of the party for the performance of all similar acts, but because of the relative character of the will or contract itself, and of all the external circumstances in proof to the mental capacity of the party. They have been held void, not because the person making them was incapable of a valid consent to any act or contract, but because the whole transaction taken together, with all its facts, of which the proof of mental weakness was one, showed that the consent, "the very essence of the act," (per Sir J. Nichol, 2 Phill. R. 70,) was wanting to *that particular act*. Thus, whilst proof of stupidity, gross ignorance, folly, or strange particular aberration of opinion, in a mind otherwise unclouded, is alone incompetent to affect the legality of an act of such a person; yet, that evidence, when taken in connection with the disposition of the property, the interests and relative situation of those affected by it, and other circumstances, may show conclusively, that this particular act of a person laboring under no general disability, wanted his consenting will and understanding; that the sound and disposing mind was deficient in regard to this special matter; that the whole was the result of fraud, of abuse of confidence, perhaps of delusion."

The learned senator, further approves and adopts the language of Mr. Justice Washington, (in 3 Wash. 587,) "that a man's capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as for instance, to make contracts for the sale of property;" and further asserts, that if we then sum up the whole doctrine of the law of wills, as affected by mental incapacity, we shall find it just, reasonable, and consistent with itself, as well as in perfect harmony with the decisions and rules touching the effect of unsoundness or weakness of understanding, in avoiding deeds and contracts.

(h) *Ingram v. Wyatt*, Per Sir J. Nichol, 1 Hagg. R. 385.

(i) See also, *Jackson v. King*, 4 Cowen, 207; *Odell v. Buck*, 21 Wend. 142; *Petrie v. Shoe-*

A man who is born deaf, dumb and blind, is looked upon by the law, as in the same state with an idiot, he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.(j) Even one who is deaf and dumb from his nativity, is, in presumption of law, an idiot, and therefore incapable of making a will; but such presumption may be rebutted, and if it sufficiently appears that he understands what a testament means, and has a desire to make one, then he may by signs and tokens declare his testament.(k)

A lunatic, that is a person usually mad, but having intervals of reason, during the time of his insanity cannot make a testament, nor dispose of anything by will. And "so strong is this impediment of insanity of mind, that if the testator make his testament, after this *furor* has overtaken him, and while as yet it possesses his mind, although after the *furor* departing or ceasing, the testator recover his former understanding, yet does not the testament made during his former fit, recover any force or strength thereby."(l)

If any one attempt to call in question or overthrow a will, on account of any supposed insanity, or "want of memory," as it is technically termed, in the testator, he must prove such impediment to have existed *previous to*, and at the date of the will; and must establish such incapacity by the clearest and most satisfactory proofs. The burden of proof rests upon the person attempting to invalidate what, on its face, purports to be a legal act.(m) Every person making a will is presumed to be of sound understanding, until the contrary be proved, so that the proof lies on the other side.(n) Where the general competency of the decedent is not questioned, the *onus* of proving that, at the particular time when the will was executed, he labored under any delusion, aberration or weakness of mind, rests with the contestant.(o)

Soundness and perfectness of mind, are held in law to be absolutely requisite in the making of wills; the health of the body merely, not being regarded. If general insanity be proved, it is presumed to continue until a recovery be shown; and the party alleging a restoration to sanity, must prove his allegation.(p) But if mad persons have lucid intervals, during which they are fully possessed of a sound and disposing mind, memory and understanding, and in such intervals make their wills, they will be good in law; so, if any person of sound mind make his will, it will not be revoked or affected by his subsequent insanity.(q)

With respect to persons of unsound mind having lucid intervals, it

maker, 24 Wend. 85; *Blanchard v. Nestle*, 3 Denio, 37; *Clarke v. Sawyer*, 2 Comst. 498; *Berger v. Hill*, 1 Bradf. 360; *Weir v. Fitz Gerald*, 2 Bradf. 42; *Mowry v. Silber*, Ib. 133; *McSorley v. McSorley*, Ib. 188; *McGuire v. Kerr*, Ib. 244; *Waters v. Oullen*, Ib. 354; *Maverick v. Reynolds*, Ib. 360; *Meehan v. Rourke*, Ib. 385; *Thompson v. Quimby*, Ib. 449.

(j) 1 Black. Comm. 304.

(k) Wms. on Exrs. 16. See also *Weir v. Fitz Gerald*, 2 Bradf. Surr. Rep. 42.

(l) Swinh. part 2, sec. 3, pl. 2; Wms. on Exrs. 18.

(m) See Wms. on Exrs. 18.

(n) Burns' Eccles. Law.

(o) *Allen v. The Public Administrator*, 1 Bradf. Surr. Rep. 378; 2 Curteis, 415.

(p) *Grobill v. Barr*, 5 Barr, 441. See also *Jackson v. Vandusen*, 5 Johns. 144.

(q) Roberts on Wills, Lovelass,

is sufficient if the evidence adduced in support of the will, shall establish that the party afflicted had intermissions, and that there was an intermission of the disorder at the time of the act. But the order of proof and presumption, is thereby inverted; for where habitual insanity is established, then the party who would take advantage of the act, done during an interval of reason, must prove such act to have been so done. In all these cases, the question is, whether a lucid interval did exist in which the act was done, and if it can be proved that such an act was rationally and sensibly done, and if it does not appear that there existed any delusion, or gross inconsistency in the disposal of the property, the whole case is proved, and nothing is left to presumption to show the lucid interval. But it must be shown that the act was done without any assistance from another person, and that the lucid interval was of sufficient length to do the act intended. The consistency and propriety of the act, will also be taken into consideration, for the purpose of showing, that a lucid interval really did exist; and such internal evidence will generally have more weight with the court than the mere opinion of witnesses.^(r)

Partial insanity, or insanity on a particular point, may invalidate a will which proceeds from the effect of such partial insanity, and which may fairly be presumed to have been made under its direct and immediate operation. But such fact is extremely difficult of proof, as direct mental perversion and actual insanity, with respect to the object of such delusion, must be satisfactorily established.^(s)

Besides the two classes of persons *non compos mentis* already mentioned, viz., idiots and lunatics, there are two more classes, viz., those who were of good and sound memory, and from some cause not directly attributable to their own act or conduct, have lost it; and those who have become *non compos* by their own act, as *drunkards*.^(t) In the former of these two latter classes must be reckoned those, who from sickness, grief, accident or old age, have lost their reason, who are not like those classed by Lord Coke as "*lunatici*," sometimes having their understanding, and sometimes not: but whose understandings are defunct; who have survived the period of the stability of their minds.^(u)

But old age alone, does not deprive a man of the capacity of making a testament, for a man may freely make his testament, how old soever he be: since it is not the integrity of the body, but of the mind that is requisite in testaments.^(v) "It is one of the painful consequences of

(r) *Cartwright v. Cartwright*, 1 Phillim. 90. See also *Scruby v. Fordham*, 1 Add. 90; *Chambers v. Queen's Proctor*, 2 Curt. 415, 451; Wms. on Exrs. 20, 21, 22, 23; *Bannatyne v. Bannatyne*, 16 Jur. 864; 14 Eng. L. & Eq. Rep. 581; 2 Robert 472.

(s) *Dew v. Clark*, 1 Add. 279; 3 Add. 79; *Stanton v. Wetherwax*, 16 Barb. S. C. R. 259, 263. It must, however, be observed that the rule of law is, that in civil suits, it is not necessary to trace or connect the morbid imagination with the act itself. If the mind is unsound, the act is void. The law avoids every act of the lunatic, during the period of the lunacy, although the act to be avoided, cannot be connected with the influence of the insanity, and may be proper in itself. *Groom v. Thomas*, 2 Hagg. 436; See Wms. on Exrs. 267.

(t) See *McSorley v. McSorley*, 2 Bradf. Surr. Rep. 188; *Waters v. Cullen*, Ib. 354.

(u) See Wms. on Exrs. 34.

(v) Swinb. part 2, sec. 5, pl. 1; Wms. on Exrs. 34; *Van Alst v. Hunter*, 5 Johns. Ch. Rep. 158; *Bleecker v. Lynch*, 1 Bradf. Surr. Rep. 458; *Butler v. Benson*, 1 Barb. Sup. Ct. Rep. 526, 538; *Moore v. Moore*, 2 Bradf. Surr. Rep. 261; *Maverick v. Reynolds*, Ib. 360.

extreme old age," says Chancellor Kent in *Van Alst v. Hunter*, "that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man, over the disposal of his property, is one of the most efficient means which he has in protracted life, to command the attention due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent acts, but contains those very dispositions which the circumstances of his situation, and the course of the natural affections dictated." Yet obviously old age may be the cause of, or accompanied by such a defect or perversion of understanding and discernment, and such a loss of memory, as to render the party equally as incapable to make a valid will, as an idiot or a child, or a lunatic person. Defect of memory, however, unless it be total or appertain to things very essential, is not sufficient to create incompetency.(w)

It is laid down that it is not necessary to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine the question, whether he was of a sound and disposing mind, memory and understanding. A man, perhaps, may not be insane, and yet not equal to the important act of disposing of his property by will.(x) In order to constitute a sound disposing mind, the testator must not only be able to understand that he is, by his will, giving the whole of his property to the object of his regard, but must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from participation in that property.(y) And generally he must possess an intelligent understanding of the contents and the effect of the instrument.(z)

As to the last of the classes of *non compos* mentioned: "He that is overcome by drink," says Swinburne,(a) "during the time of his drunkenness, is compared to a madman, and therefore if he make his testament at that time, it is void in law, which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding; otherwise, albeit, his understanding is obscured, and his memory troubled, yet he may make his testament, being in that case."

Blind persons may of course make their wills, but such cases will be more conveniently considered hereafter, in connection with the subject of the "form and manner of making a will."(b)

In respect to the age requisite to the valid execution of a will, it was formerly the weight of opinion, that an infant, if a male, of the age of fourteen, and if a female, of the age of twelve, might make a testament of chattels;(c) but now, as has been seen, the party, if a male, must have attained the age of eighteen, and if a female, the age of sixteen,

(w) *Bleecker v. Lynch*, 1 Bradf. Surr. Rep. 466.

(x) *Mountain v. Bennett*, 1 Cox, 356.

(y) *Harwood v. Baker*, 3 Moo. P. C. C. 282, 290.

(z) *Burger v. Hill*, 1 Bradf. Surr. Rep. 360.

(a) Part 2, sec. 6; Wms. on Exrs. 36.

(b) *Post*.

(c) 2 Black's Comm. 497; 3 R. S. (2d ed.) Appendix, 629.

before he or she is competent to the due execution of a will. An infant never could, and cannot now, make a valid devise; and the Revised Statutes specially exclude the exercise of a power by a married woman during her infancy.^(d) It may not be quite superfluous to remark in this place, with reference to the disability of infancy, that in computing the age of a person, for testamentary or other purposes, the day of his birth is included; thus, if he were born on the 16th January, 1800, he would have attained his majority on the 15th January, 1821;^(e) and as the law does not recognize fractions of a day, the age would be attained at the first instant of the latter day.^(f)

Persons Disabled from making a Will for want of Liberty or Free Will.

Prisoners, captives and the like are included in this class, but the law does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such person could be supposed to have free will and liberty in the making of his will.^(g) Any will, the making of which has been induced by threats, or through fear, restraint, fraud, deceit, undue influence, or importunity, may be set aside; but these cases, as well as all cases generally, under the present head, will properly be considered more fully hereafter,^(h) in connection with the subject of the proof requisite to the establishment of a will.

Formerly married women were incompetent to make a will, and came within the causes of disability now under consideration. A wife could not devise her lands by will, for she was, as she is by the above quoted section 1, excepted out of the statute. Yet where an estate was limited to uses, and a power was given to a *feme covert* before marriage to declare those uses, such limitations of uses might take effect; and though a married woman could not be said strictly to make a will, yet she might, as she still may, devise, by way of execution of a power, which is rather an appointment than a will, or a writing in nature of a will; and whoever takes under the same, takes by virtue of the execution of the power, and by the power coupled with the writing, and as if the limitation in that writing of appointment had been contained in the deed creating the power, for he takes from the author of the power.⁽ⁱ⁾

(d) 4 Kent's Comm. 506.

(e) *Herbert v. Torball*, 1 Sid. 142; S. C., Raym. 84.

(f) 1 Jarman on Wills.

(g) 2 Black's Comm. 497.

(h) *Post*.

(i) 2 Black's Comm. 498; 2 Kent's Comm. 170, 171; 1 Stephens' Comm. (Am. ed.) 550; *Southby v. Stonehouse*, 2 Vesey, 611; *Strong v. Wilkin*, 1 Barb. Ch. Rep. 13, 14; *American Home Missionary Society v. Wadham*, 10 Barb. Sup. Ct. Reps. 597.

The Statute of Powers, art. 3, title 2, ch. 1, part 2, of the Revised Statutes, (1 R. S. 731; 4th ed. Vol. II, 141,) prescribes the requisites and formalities necessary, as well to the creation of a power as to the due execution of a will made under the same.

By the 74th section of the statute, (1 R. S. 732,) a power is defined to be an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform.

By sec. 80, a general and beneficial power may be given to a married woman, to dispose,

With respect to personal property, previous to the Revised Statutes, a married woman was incapable of making a testament of such property, without the consent of her husband. For, it was said, all her

during her marriage, and without the concurrence of her husband, of lands conveyed or devised to her in fee.

By sec. 87, a special and beneficial power may be granted to a married woman to dispose during the marriage, and without the concurrence of her husband, of any estate less than a fee belonging to her, in the lands to which the power relates.

By sec. 106. A power may be granted: 1. By a suitable clause contained in a conveyance of some estate in the lands, to which the power relates;

2. By a devise contained in a last will and testament.

By sec. 109, a power may be vested in any person capable in law of holding, but cannot be exercised by any person not capable of aliening lands, except in the single case mentioned in the next section.

By sec. 110, a married woman may execute a power during her marriage, by grant or devise, as may be authorized by the power, without the concurrence of her husband, unless by the terms of the power, its execution by her during marriage is expressly or impliedly prohibited.

By sec. 111, no power vested in a married woman, during her infancy, can be exercised by her, until she attains her full age.

By sec. 115, where a power to dispose of lands is confined to a disposition by devise or will, the instrument of execution must be a will duly executed, according to the provisions of the sixth chapter of the act.

By sec. 130. When a married woman, entitled to an estate in fee, shall be authorized by a power, to dispose of such estate during her marriage, she may, by virtue of such power, create any estate, which she might create if unmarried. See *Jackson v. Edwards*, 7 Paige, 336; S. C., on appeal, 22 Wend. 498; *Frazer v. Western*, 1 Barb. Ch. Rep. 220, 240. These provisions of the statute have special reference to real estate. The principle and equity of the statute would doubtless extend, however, to enable a married woman who had personal estate conveyed or bequeathed to her separate use, with an express power to dispose of it by will at her death, to make a will or an instrument in the nature of a will, for the purpose of appointing or disposing of her separate estate in pursuance of such power. See *Strong v. Wilkin*, 1 Barb. Ch. Rep. 9; *Moehring v. Mitchell*, Id. 272; *American Home Missionary Society v. Wadhams*, 10 Barb. Sup. Ct. Rep. 597; *Van Wert v. Benedict*, 1 Bradf. Surr. Rep. 114.

A will made under a power must be executed with the same formalities, and be proved in the same manner as a proper will. "Formerly," it is said in a work of high character, "the Ecclesiastical Courts did not take upon themselves to enter with any great minuteness into the construction of the powers under which wills of this kind were executed, or as to the due compliance with their conditions. 1 Phillim. 353; *Bramhall v. Burchell*, 3 Add. 264; *Draper v. Hitch*, 1 Hagg. 675. But according to the modern practice, until the decision of the case of *Vincent v. Barnes*, (hereafter mentioned,) the Court of Probate considered itself bound to decide in the first instance, not only whether there was a power authorizing the testamentary act, but also whether the power had been duly executed, before it gave the instrument the sanction of its seal. *Allen v. Bradshaw*, 1 Curt. 110, 121; *In the Goods of Biggar*, 2 Curt. 336. Yet, if the court felt any real doubt on the point, it was always deemed the safer course to admit the paper to probate: inasmuch as the production of such a probate will not alone be sufficient to induce a court of equity to act upon it; for, with respect to other special circumstances which may be required to give the instrument effect as a valid appointment, viz., attestation, sealing, &c., the temporal courts have never been contented with the judgment of the spiritual court. *Rich v. Cockell*, 9 Ves. 376; 2 Roper on Husband and Wife, 189; and see *Douglas v. Cooper*, 3 M. & K. 378. Whilst on the other hand, if the Court of Probate should reject the paper, its decision would be final; as the court of construction will not proceed to the consideration of the effect of any testamentary paper, till it has been proved in the proper Ecclesiastical Court. 1 Curt. 121, 122; *In the Goods of Biggar*, 2 Curt. 336. See Wms. on Exrs, part 1, book 4, ch. 3, sec. 9; but see, also, *Goldsworthy v. Crossley*, 4 Hara, 140, 145.) But at last, continues the work referred to, in the case of *Barnes v. Vincent*, 4 Notes of Cas. Suppl. 21, it was held by the judicial committee of the privy council, (reversing the decision of the Prerogative Court of Canterbury,) that the proper course for the Ecclesiastical Court is to grant probate wheresoever the paper professes to be made and executed under a power, and is made by one whose capacity and testamentary intention are clear, and no other objection occurs save those connected with the power, (for example, no objection on the provisions of the wills act,) and to leave the court, which has to deal with the rights under that instrument, to decide whether or not it is authorized by

personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her; it would be, therefore, extremely inconsistent to give her a power of defeating that

that power and by its execution." Their lordships, it is added, appear further to have been of opinion, that, on a power being alleged, the Ecclesiastical Courts should grant probate, without going into any question as to the existence of the power. The decision in this case, it is further said, was declared by their lordships to be a restoration of "the ancient and laudable practice" of the Ecclesiastical Court. Williams on Executors, 48, 49, 50.

Accordingly, and chiefly upon the authority of *Barnes v. Vincent*, it was held by the surrogate of the county of New York, in *Van Wert v. Benedict*, 1 Bradf. Surr. Rep. 114, that on the proof of a will made under a power, the Probate Court has nothing to do with the question, whether the power is well executed, or whether it authorizes the will or in fact exists at all: and that it is not necessary for the Probate Court to have before it the instrument containing the alleged power; but if the testamentary paper be properly proved, the probate is limited, the decree declaring the instrument to be duly proved as a valid will, so far as it may be authorized by a valid power for that purpose,—thus leaving the question of its being a due execution of a power, for the determination of a court of construction. See also *In the Matter of the will of Sarah Stewart*, 11 Paige, 398.

The doctrine of *Barnes v. Vincent*, has, however, been held in the Prerogative Court, not to be applicable to wills made under a power executed since the statute 1 Victoria, chap. 26, which took effect 1 January, 1838, and upon grounds and reasoning which would seem to be entitled to great consideration in the case of a will made pursuant to a power under the Revised Statutes. The case of *Este v. Este*, (in the Prerogative Court, January 25 and February 11, 1851, 15 Jur. 159; 1 Eng. L. & Eq. Rep. 629; 2 Robert, 351,) in which this conclusion was arrived at, arose upon an objection to an allegation propounding the will of a married woman, deceased, merely reciting that she made the will under and by virtue of certain powers and authorities vested in her by a certain deed of settlement dated &c., but not pleading or annexing the deed. The objection to the allegation was that it did not plead the deed, and Sir Herbert Jenner Fust, in his judgment upon the case, examines and reasons upon the decision in *Barnes v. Vincent*, as follows:

"With respect to that case, it may be observed, that both the power and the will there considered were previous to the year 1838, the will itself being made in 1836; and it is clear, when you come to look at the words of that judgment, that great part of the argument turned upon the anomalous state of the law with reference to the granting probate of wills of married women; that the sentence granting probate would be inconclusive one way, whilst the sentence refusing probate would be conclusive the other way, since, if probate were refused, the courts of equity never would know of the will at all. And it was said that there was a considerable class of cases in which equity would relieve against a defective execution of a power, as in favor of a purchaser, or creditor, or child; but if probate should have been refused by the Ecclesiastical Court, on the grounds of the execution being defective, no such relief ever could be extended in any case; because the court, which alone could relieve, never could know if the instrument existed, nor could see the defect in the execution; and the Court of Probate was bound by the fact of a defective execution, and could not remedy it. But the present Statute of Wills gets rid of the formalities which might be imposed upon the execution of wills by married women. The 8th, 9th and 10th sections provide for and describe the manner and form of execution which will be necessary in all cases to give effect to the wills of married women executed since the statute came into operation. There are certainly some of the expressions in *Barnes v. Vincent*, which I have referred to, that would tend to show that this court has no right to look at the power; but I think those expressions must be taken with respect to the state of the law before the present statute, for no court of equity could now relieve against a defective execution, since the legislature has imposed certain forms which are absolutely necessary and cannot be supplied, to give effect to the will; so that all argument derived from the power which the courts of equity had before the statute, is now done away with. I am afraid the remedy suggested by the learned lord, if this court were, in all those cases where a power is alleged, to grant probate without calling for the power, would be very inadequate. But suppose the will to be contested on the ground of coercion, or undue influence or incapacity, how is this court to know who have a right to contest the will; in other words, who are interested in an intestacy, unless it has an opportunity of looking at the power? It is only by an inspection of the deed that this court can ascertain the rights of the parties; and therefore, upon the general principle, I am of opinion that this settlement must be produced, and that the court is entitled to look at the deed, that it may see who are the persons having a right to oppose probate, as interested in an intestacy, and to whom the property would go if the will were pronounced against."

provision of the law, by bequeathing those chattels to another. Yet by her husband's license she might make a testament; but such license was more properly his assent; for, unless it was given to the particular will in question, it would not be a complete testament, even though the husband beforehand had given her permission to make a will.(j)

Under the Revised Statutes, a married woman was prohibited from making a will of personal property in any case, even with the assent or license of her husband, for the statute declared, as it still declares, as has been seen, that every male person of eighteen years of age, and every female, *not being a married woman*, of the age of sixteen, and no others, may make a will of personal estate.(k)

But now by statute, married women are not under any disability in respect to the making of wills, whether of real or personal estate. The act "for the more effectual protection of the property of married women," passed April 7th, 1848,(l) as amended by the act of April 11th, 1849,(m) provides as follows:

Sec. 3. Any married female may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.(n)

This act substantially repeals the restrictions contained in the above sections of the Revised Statutes, against the validity of a will by a married woman in regard to real and personal estate. And by the act, married women are competent to devise and bequeath real and personal

This judgment puts the necessity for a production of the power, upon the ground of ascertaining who are entitled to contest the will; but if the court once examine the power for any purpose, it can hardly avoid at least passing upon the question, whether the power gave the decedent the authority to make the will at all.

The 8th section of the Statute of Victoria, referred to in this judgment, provides that no will made by any married woman shall be valid, except such a will as might have been made by a married woman, before the passing of the act. The 9th section prescribes the manner and form of executing wills, and the 10th section, provides that no appointment made by will, in exercise of any power shall be valid, unless the same be executed in manner thereinbefore required; and every will executed in manner thereinbefore required, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required, that a will made in exercise of such power, should be executed with some additional, or other form of execution or solemnity. The statute, article third, title 1, chap. 6, part 2, of the Revised Statutes, sec. 40, (2 R. S. 63; 4th ed. 246,) provides that every last will and testament, of real or personal property, or both, shall be executed and attested in the manner therein prescribed, and by the above quoted provision of the Statute of Powers, sec. 115, a will of lands under a power must be executed in conformity with this section. These provisions at any rate, so far as respects real estate, are substantially the same as those of the English statute, and the same principles and rules of practice might well be held applicable to both statutes. See *In the Matter of proving will of Jennings*, 10 Legal Observer, 253.

A will in execution of a power, is ambulatory and revocable, in the same manner as a proper will. 1 Bradf. Surr. Rep. 114.

(j) 2 Black. Comm. 498.

(k) *Moehring v. Mitchell*, 1 Barb. Ch. Rep. 264; 4 Kent's Comm. (7th ed.) 506, Ib. note; but see *Ileyer v. Burger*, 1 Hoff. Ch. Rep. 1.

(l) S. L. 1848, 307.

(m) S. L. 1849, 528.

(n) 2 R. S. (4th ed.) 331.

property in the same manner and with the like effect as if they were unmarried. The act removes a personal disability and the power given to devise, probably is not limited to subsequently acquired property. If it be, however, where the capacity exists to make a will, when the will of a *feme covert* made subsequently to the passage of the act is properly proved, it is the duty of the Surrogate's Court to admit it to probate, leaving it to the proper tribunals to determine, as occasion may arise, what property passes by it.(o)

Nor can the operation or effect of the will, on the estate or rights of the husband in the property of the wife, be considered on the probate. The power to make a will relates to the personal capacity and the probate; the right to dispose of any particular property relates to the effect of the instrument when proved, and its construction. On proof, therefore, of the due execution of the will of a married woman, deceased, the surrogate is bound to admit the will to probate, leaving the question of what passes under the instrument for future construction.(p)

Of the Form and Manner of making a Will.

Before the Revised Statutes, no solemnities of any kind were necessary to the making of a will of personal estate. The second section of the act "concerning wills,"(q) which required the formalities of signature and attestation for a devise of lands, did not extend to wills of personal property. The nineteenth section provided that every person might by will, in writing, give or bequeath his personal estate in the same manner as if the act had not been passed; and the fourteenth section made it necessary that wills of personal estate should, generally speaking, be reduced *into writing* in the testator's lifetime; inasmuch as it was thereby enacted, that no nuncupative will (where the estate thereby bequeathed should exceed the value of seventy-five dollars) should be good unless under the particular circumstances therein specified. But no other formality whatever was necessary to give them effect and operation. Whence it often happened that a will, intending to dispose of both real and personal estate, was inoperative as to the former, and at the same time a perfect disposition of the latter.

The act "concerning wills" was repealed from and after the thirty-first day of December, 1829,(r) and the Revised Statutes, which took effect on the first day of January, 1830, contain enactments, the result of which is that the solemnities prescribed by them, are required to render valid any will or other testamentary disposition of every description of property without distinction; so that the same formalities of execution, publication and attestation, are necessary, whether the instrument disposes of real or of personal estate.

These enactments are contained in the first title of the sixth chapter of the second part of the Revised Statutes, and are as follows:

(o) *Van Wert v. Benedict*, 1 Bradf. Surr. Rep. 116.

(p) *Waters v. Cullen*, 2 Bradf. Surr. Rep. 354.

(q) 1 R. L. 1813, 364.

(r) See act "to repeal certain acts and parts of acts," passed December 10th, 1828. S. L. 1828; 3 R. L. (3d ed.) 161.

Sec. 33. [Sec. 40.] Every last will and testament [or codicil],(s) of real or personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will;
2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses;
3. The testator, at the time of making such subscriptions, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament;
4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.(t)

Sec. 34. [Sec. 41.] The witnesses to any will shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid be excused or incapacitated on that account, from testifying respecting the execution of such will.(u)

Sec. 19. [Sec. 22.] No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner, while at sea.(v)

Sec. 91. [Sec. 70.] The provisions of this title shall not be construed to impair the validity of the execution of any will made before this chapter shall take effect, or to affect the construction of any such will.(w)

The formalities required for the valid execution of a will made before the Revised Statutes took effect, do not any longer form a practical subject for consideration. Within the period of twenty-three years, which has elapsed since that event, every will executed previously has in all human probability been disposed of. The few recent cases which have arisen on such wills would not justify any extended examination of the rules of law which prevailed under the former system.(x) In this work, therefore, the principles of the old law will be considered, if at all, only incidentally and by way of explanation or illustration of the plan introduced by the Revised Statutes.

It may properly be noted, however, that in a recent case, where the testator died since the Revised Statutes, and his will executed previously to the Revised Statutes was offered for proof as a will of both

(s) Sec. 92. [Sec. 71.] The term "will," as used in this chapter, shall include all codicils, as well as wills.

(t) 2 R. S. 63; 4th ed. 246.

(u) Id.

(v) 2 R. S. 60; 4th ed. 243.

(w) 2 R. S. 68, 4th Ed. 254.

(x) See *Jauncey v. Thorne*, 2 Barb. Ch. Rep. 40; *Lawrence v. Hebard*, 1 Bradf. Surr. Rep. 252; *Sherry v. Lowler*, Id. 437.

real and personal estate, and was attested by two witnesses only, and therefore defective in respect to real estate according to the old law, which required three witnesses to a devise of lands,^(y) it was considered in view of the above section 91, [sec. 70,] providing that the validity of wills already executed should not be impaired by the new provisions of the Revised Statutes, that the law stopped at that point, thus leaving to wills executed before, the benefit of the change, so that if bad by the law existing at the time of their execution, they might be cured and become valid by the law existing at the time of the death of the testator. That if the testator had died previous to the Revised Statutes, the case would of course have been otherwise; but that his decease subsequent to the new law going into effect, attached the benefit thereof to his will, and aided though it might not impair the validity of its execution. It was held, therefore, although this will was attested by only two witnesses instead of three as required by law at the time of its execution, in order to pass real estate, that still by the decease of the testator after the Revised Statutes took effect, the defect was cured, and that the will had been properly admitted and recorded as a valid will of real estate.^(z)

The above sec. 33, [sec. 40,] comprises all the directions which are necessary to be observed in the due execution of a will. The requirements of this statute are not merely cumulative to any previous law or statute, but are of themselves entirely sufficient for the valid execution of a will, and all former statutory provisions are inapplicable; in fact, there is not any law, prescribing the mode in which wills may be made, now in force other than the Revised Statutes. Wills executed previously to their enactment, according to the law as it then stood, as has been seen, are expressly saved; but in every other case, the Revised Statutes are now the sole and exclusive guide as to all formalities in the execution of wills, required to be made in conformity to the laws of this state.^(a)

The statute is in its terms perfectly explicit. Four distinct ingredients, as declared, must enter into and together constitute one entire complete substance, essential to the complete execution of the instrument as a will: 1. There must be a signing by the testator at the end of the will; 2. The signing must take place in the presence of each of the witnesses, or be acknowledged to have been made in their presence; 3. The testator at the time of signing or acknowledging the writing, shall declare it to be his last will; and 4. There must be two witnesses. Every one of these four requisites in contemplation of the statute, is to be regarded as essential as another. There must be a concurrence of all to give validity to the act, and the omission of either is fatal. A will cannot be made by silence; there must be a distinct affirmative performance of all the statutory requisites.^(b) The four facts specified in the section must exist, and those acts therein directed be fully and com-

(y) See "act concerning wills," sec. 2; 1 R. L. 1813, 364.

(z) *Lawrence v. Hebard*, 1 Bradf. Surr. Rep. 254.

(a) *Ruddon v. McDonald*, 1 Bradf. Surr. Rep. 352; *Lyon v. Smith*, 11 Bar. Sup. Ct. Rep. 124. At variance with a dictum of Mr. Justice Hand in *Buller v. Benson*, 1 Barb. Sup. Ct. Rep. 530.

(b) *Ex parte Beers*, 2 Bradf. Surr. Rep. 163, 165.

pletely performed. The statute is peremptory, and no evasion or omission can be excused or tolerated.(c)

While the courts, however, have, with commendable firmness, insisted upon a rigid compliance with the formula prescribed by the statute, they have never held that a literal compliance was necessary. A substantial compliance is enough. The only sure guide is to look at the substance, sense and object of the law, and with the aid of these lights endeavor to ascertain whether there has been a substantial compliance. No particular form of words is required to comply with the statute; if the testator knows what is necessary and does it, he may use his own language. But the statute must be substantially complied with regardless of consequences.(d)

On the one hand, nothing can be more contrary to the duty of a court of justice, than to impair the force of a legislative enactment by a latitudinarian construction; on the other it would be equally against the intention of the legislature, by too rigid an interpretation of the words of the statute, to render void wills when the requisites of the statute have been substantially complied with, and when those wills do not contain any of those faults or defects, which it must have been the intention of the legislature, should for some reasons render them inoperative. In a state like this, where the power of testation exists to so wide an extent, all forms must be intended to protect the right so existing, and to secure the genuineness and authenticity of all testamentary instruments, and not to restrict the right of testation; and if wills *bona fide* made by testators are defeated from want of observing the solemnities required, such an occurrence is an evil in itself, but an evil to be submitted to, because, according to the judgment of the legislature, such sacrifice is conducive to the general safety and well doing of the right of testation.(e) The question in every case on the execution of a will, is not whether the testator has become entitled to devise, by full compliance with the letter of the law; but whether there has been such a neglect of the legal requirements enacted to guard against fraud, as to make the will inoperative as an evidence of intention, and consequently to leave the property to be governed by the general laws of descent or distribution.(f)

Neither of the four acts, which, united, make a valid execution of a will, may be done at a different time from the rest. If the instrument has in fact been signed at a previous time, then the signature must be acknowledged to the subscribing witnesses, which is deemed to be equivalent to a new signing of the instrument. But a will is duly executed when the several acts required by the statute have been performed at the same time, whatever the order in which such acts may

(c) *Remsen v. Brinckerhoff*, 26 Wend. 331, per Nelson, Ch. J.; *Whitbeck v. Patterson*, 10 Barb. Sup. Ct. Rep. 610, per Taylor, J.

(d) *Seguine v. Seguine*, 2 Barb. Sup. Ct. Rep. 393, per Edmonds, J.; *Buller v. Benson*, 1 Barb. Sup. Ct. Rep. 534, per Hand, J.; *Nelson v. McGiffert*, 3 Barb. Chan. Rep. 163; *Remsen v. Brinckerhoff*, 26 Wend. 332, per Nelson, Ch. J.; *Lewis against Lewis*, 1 Kernan, 220, 224.

(e) Substantially, per Dr. Lushington, *In the Goods of Smith*, and *In the Goods of Cooper*, 16 Jur. 178.

(f) Per Verplanck, Senator, *Remsen v. Brinckerhoff*, 26 Wend. 335.

be severally performed.(g) The subscription of the will by the testator, his publication of it, his request to the witnesses, and their subscriptions, are all, however, to be done at the same time, not at the same instant of time, for that is impracticable; but at the same interval, one act immediately following the other without any interval, and without any interruption to the continuous chain of the transaction.(h)

Of the Subscription of the Will by the Testator.

The statute requires that in order to the due execution of a will, it shall be subscribed by the testator at the end of the will. It is not necessary that the testator should be able to write his name, for it has been determined that the signing of a will by making a mark is a sufficient subscription within the meaning of the act.(i) The mark, however, it should be understood, is to be made between the given and the surname, or otherwise in connection with the name of the testator, written by another person by the direction of the testator. The former statute required that the will should be signed by the testator, or by some other person in his presence and by his express direction. And that the legislature did not intend to alter the law in that respect, is evident from the fact that this mode of subscribing the testator's name by the instrumentality of another person, but by the testator's direction, is recognized in the above quoted 41st section of the statute.(j) And where the testator's name is written by another person by his direction, his mark, although a common, would seem to be an unnecessary formality.

With reference to the construction to be given to this provision of the statute, it is a sound principle that such a construction ought to be put upon a statute as may best answer the intention which the makers had in view, and that is sometimes to be collected from the cause or necessity of making it, at other times from other circumstances. Whenever the intention can be discovered, it ought to be followed with reason and discretion in its construction, although such construction may seem contrary to its letter.(k)

The reason and object of the provisions of the present statute of wills and testaments, and especially of the provision now under consideration, would seem to be obvious, especially when compared with the former statutes on that subject, and the course of judicial decisions under them. The act of 1813, "concerning wills," required (sec. 2) that every last will and testament of lands should be in writing, and

(g) *Doe v. Roe*, 2 Barb. Sup. Ct. Rep. 200, 205; See also *Keeney v. Whitmarsh*, 16 Barb. Sup. Ct. Rep. 141.

(h) See *Sequine v. Sequine*, 2 Barb. Sup. Ct. Rep. 385, 395.

(i) *Stewart's Ears. v. Lisperard*, 26 Wend. 289, per Campbell, Surrogate; "1 Rob. on Wills, 94; *Addy v. Grieg*, 8 Ves. 504;" *Chaffee v. Baptist Missionary Convention*, 10 Paige, 91. In the *Goods of Bryce*, 2 Curt. 325; *Buller v. Benson*, 1 Barb. Sup. Ct. Rep. 533, per Hand, J. See also *Keeney v. Whitmarsh*, 16 Ib. 141.

(j) See *Chaffee v. Baptist Missionary Convention*, 10 Paige, 91. The provision of the 41st section alluded to, it should be noted, was originally recommended by the revisers to be adopted in connection with a provision expressly authorizing the testator's name to be signed by another person by his direction. See 3 Revised and other Statutes, (2d ed.,) Appendix, 627, 8; also *post*.

(k) *Tonckle v. Hall*, per Jewett, J., 4 Coms. 144.

signed by the party making the same, or by some other person in his presence and by his express direction, &c. So the English Statute of Frauds required that all devises and bequests of lands should be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, &c. Questions had arisen under these statutes, as to what the legislature meant by the word "signed," namely, whether it should be construed in its strict sense, and by analogy to other instruments, or whether it should be liberally expounded and left open as a question of construction upon intention, to be inferred from the facts and circumstances attending each particular case. The construction had been, as well in the courts of England as here, that the writing of the name of the testator in the body of the will, if written by himself with the intent of giving validity to the will, was a sufficient "signing" within the statute.^(l) It was considered also that the putting of a seal by the testator was a sufficient signing; for that *signum* was no more than a mark, and sealing was a sufficient mark that it was his will.^(m) But this doctrine was afterwards overruled.⁽ⁿ⁾

Thus the old law stood, and the mischief of it was, that, as it was not necessary for the testator to have adopted the instrument after it was finished, by actually signing the same at the close of the will, it did not denote clearly that he had perfected and completed it. To remedy this evil, and to prevent future controversy as to whether a will signed by the testator in any other part of the instrument than at the end denoted a complete and perfect instrument, the statute under consideration requires that "it shall be subscribed by the testator at the end of the will." And the Statute of Victoria I, ch. 26, passed in 1837, requires that the will "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction;" and to avoid the misconstruction which had prevailed as to "signing," the words "subscribed at the end of the will," are used in the Revised Statutes, and the words "signed at the foot or end thereof," are used in the Statute of Victoria.

But questions of this kind do not appear to be altogether excluded by the operation of these enactments, and a new ground of contest has arisen out of them, both in this state and in England, as to what may be considered a subscription or signing of the will at the end or foot thereof.

In *Tonnele v. Hall*,^(o) the writing of the instrument propounded for probate, commenced on the first of several sheets of paper, stitched together immediately below a margin, in this form: "In the name of God, amen. I, John Tonnele, of the city of New York, being of sound mind and memory, and considering the uncertainty of life, do make, publish and declare this to be my last will and testament, in manner

(l) "1 Powell on Dev. 74; 1 Jarman on Wills, 70; *Lemayn v. Stanley*, 3 Levinz, 1; *Hilton v. King*, Id. 86; *Pearson v. Wightman*, 1 Const. Court. Rep. 343;" Wms. on Exrs. 64.

(m) "*Lemayn v. Stanley*, 3 Lev. 1; S. C., 1 Freem. 538."

(n) Wms. on Exrs. 64, and cases cited.

(o) 4 Comstock, 140; from the able and lucid opinion of Mr. Justice Jewett, in which case the above remarks on the construction of the first subdivision of the statute, are for the most part taken.

and form following, that is to say"—and was continued on that and the four succeeding sheets, (turning over at the bottom of each of the first four sheets,) when it was brought to a close as follows: "In witness whereof, I have hereunto set my hand and seal, the twenty-second day of October, in the year of our Lord one thousand eight hundred and forty-four." At this point the testator subscribed and sealed the instrument. Following this was an attestation clause, in the usual form of such clauses to wills, which was subscribed by three witnesses. The next sheet was entirely blank, and was succeeded by a sheet on which was written, "Map of the property of John Tonnele in the Ninth and Sixteenth Wards, from surveys and maps made by Geo. B. Smith and Edw'd Doughty, in 1828 and 1835, by R. Spencer, city surveyor, July 8th, 1842." And also written on the same, "Reduced copy of a map on file in the Register's office in the city of New York, R. S." This map indicated the position by numbers, &c., of various lots of land in the city of New York, owned by the testator, and which the will purported to dispose of, but it was not signed by the testator nor by the witnesses. Between the last mentioned sheet and the envelope there was another blank sheet, and the envelope was stitched to and enclosed the whole.

The first clause by which any part of his real estate was devised, occurred in the second folio, whereby "the brick house on the rear of lot number 73, on the *map* hereinafter mentioned, together, &c., was devised to A. H., to hold during her life." After some other provisions, a devise followed of several other lots of his real estate, which were described as being designated on a certain map now on file in the office of the Register of the city and county of New York, (a copy of which on a reduced scale is hereto annexed,) entitled map of the property of John Tonnele, Esq., &c., as above given. In each subsequent devise by which any other of the lots of land laid down upon the map were disposed of, they were described as being "designated on the said *map*" by certain numbers mentioned, and no reference was made to the *copy* of the *map* annexed.

The point taken in opposition to the will was, that the execution of the instrument was not in conformity to the first and fourth requisites of the statute; because, as was insisted, it was neither *subscribed* by John Tonnele, nor *signed* by the *witnesses*, at the *end* of it. It was contended, that as the map annexed should be regarded as a component part of the instrument, at the time of its execution, and as it was written on the last sheet of the papers composing the instrument, it was necessarily the end of the instrument, where the subscription by the testator and the signing by the witnesses, to constitute it a valid will, should have been made.

It was held by the Court of Appeals that the will was subscribed by the testator *at the end of the will*, within the meaning and intent of the statute, and that the execution thereof was valid.

In the case of the will of Catharine Kerr, deceased, before the surrogate of the county of New York, (*p*) the closing portion of the will and the signatures were as follows:

"To the children of Mary Dow, residing in Ireland, in county Kilkenny, Give and bequath two Hundred dollars, to be equally divided between them. If there be a balance, my executors will divided it among my relations that are not herein mentioned.

CATHERINE KEER.

Phelan,

"I herby appoint Michⁿ of 2d st., and John Kelly, of 9th st., as my executors to this my last will testament."

"Witnesses,

R. KEIN,

"MATHEW M. SMITH.

pay

"I herby order my executors to pay all my lawful debts & funeral expenses—should it please the Almighty now to call me. This they will do before paying any legacy above mentioned.

"CATH^e KEER."

There was a question as to the mental capacity of the testatrix, and also as to the genuineness of her alleged subscription, the two witnesses calling her *Keer*, and the two subscriptions being of that name, her Christian name Catharine being abbreviated, whilst her real name was Kerr, and several previous papers were produced in which her name, proved to have been signed by herself, was invariably written *Catharine Kerr* in full. But the surrogate held that the form of the will was fatally defective, because the will was not subscribed by the testatrix, and signed by the attesting witnesses at the end, in conformity with the requirements of the statute, and as the case arose on allegations, revoked and annulled the previous probate.(q)

(q) Numerous cases on this head have arisen in England under the Statute of Victoria.

In an early case where the will was written on two sides of paper, and the testator signed at the bottom of the first side, which signature was attested, and that side ended with an unfinished sentence, and the will concluded on the second side "dated this 11th day of April, 1838;" but there was no signature to that side; Sir Herbert Jenner Fust refused a motion for probate, on the ground that the deceased had omitted to sign the will at the foot or end. *In the Goods of Milward*, 1 Curt. 912. So, where a testator had signed his name in the margin of the will, not far from, but not "at the foot," a motion for probate was refused, although it appeared on affidavit that he thought he had obeyed the exigencies of the statute, and had in fact mistaken the directions of a printed paper professing to give correct instructions for making a will under the new act. *In the Goods of Eyles*, Prerog. H. T., 1840; See Wms. on Exrs. 65. In a subsequent case, however, where the will was written on paper folded in the middle, so as to make four pages, and it began on the first page and was continued and concluded on the third; there was no signature on that page, though there was room there for the name of the testator, but not for the attestation clause, which was written on the lower part of the second (otherwise blank) page, and underneath it were the signatures of the testator and the witnesses; Sir H. Jenner Fust admitted the will to probate, being of opinion that the signature was at the "end," though not at the "foot." *In the Goods of Baker*, 3 Notes of Cas. 162; See Wms. on Exrs. 65. On the same principle, in a case where the will was written from instructions given by the testatrix, all at one time as far as and including the *testimonium* clause, but, before the execution, she directed another clause to be added, part of which ran below that clause and below the signatures of herself and of the witnesses, leaving no room for anything else, the same judge admitted the will to probate. *In the Goods of Powell*, 4 Notes of Cas. 391; See Wms. on Exrs. 66.

In a case where, on the face of the will, the clause appointing the executors appeared to have been written after the signature of the testator, although the proof was that that clause was written by direction of the testator, and previously to his signing the paper, and that he signed his name the last thing, Sir H. Jenner Fust refused probate to the executors, on the ground that if the appointment of the executors was part of the will, the testator had not complied with the act by signing it "at the foot or end thereof," administration with the will

A signature of the testator's name to the will by his direction, may well be made by a person who is one of the two attesting witnesses to the will. The statute is peremptory, that the person signing the tes-

annexed, omitting the clause appointing the executors, was, however, afterwards granted. *In the Goods of Howell*, 2 Curt. 342; See also *In the Goods of Davies*, 3 Curt. 748; *In the Goods of Jones*, 4 Notes of Cas. 532; Wms. on Exrs. 66. So if the signature is at the end of the dispositive part of the will, it has been held to be at the foot or end of the will, within the meaning of the act, notwithstanding it precedes a memorandum expressing some expectations of the testator as to his property, but not in any way disposing of any part thereof; and probate has been granted excluding therefrom the memorandum. *Keating v. Brooks*, 4 Notes of Cas. 253, 260; See *In the Goods of Davies*, 3 Curt. 748; Wms. on Exrs. 67.

In other cases questions have arisen by reason of a blank space having been left in the will between the conclusion of it and the signature of the testator. In the earlier cases on this subject, Sir H. Jenner Fust put a very liberal construction on this part of the act. Thus a case occurred (*In the Goods of Carver*, 3 Curt. 29) in which the will was written on a printed form, and ended on the first sheet of the paper, where there was not room for the testator's signature and that of the witnesses, and the testator, instead of signing his name at the top of the next page, wrote it at the end of the printed form, where the testator's signature was directed to be made by the instructions in the margin of the paper; and probate of the will was allowed to pass. In another case, (*In the Goods of Gore*, 3 Curt. 758), the body or dispositive part of a will was written on and occupied the entire first side of a sheet of paper. The second side of the sheet was left in blank. On the third side was a full attestation clause, and at the foot or end thereof, were the signature of the testator and the subscriptions of two witnesses. Sir H. Jenner Fust allowed probate to pass. This judgment, it would appear, was in some degree founded upon the circumstance, that the whole of the deceased's property was disposed of by the will, and consequently there was not any reason to apprehend that the deceased intended to make any further bequest. But in latter cases, the same learned judge, with the concurrence of the judicial committee of the privy council, felt it necessary to take a more rigid view of the enactment in question, on the ground that it was intended to prevent any addition being made to the will after the deceased had executed it in the presence of witnesses; and it seems to be now established, that notwithstanding the will contains a complete disposition of the property, and an appointment of an executor, yet, if there is an unnecessary and unreasonable blank space left between the conclusion of the will and the signature of the testator, the will is ill executed, even though it be manifest that he had no intention to evade the law, or to do anything more to the will after execution, but, on the contrary, was anxious to comply with the requisites of the statute. *Willis v. Lowe*, 5 Notes of Cas. 428; *Same v. Bryer*, 6 Notes of Cases, 20; 13 Jur. 289. Affirmed in the privy council, 6 Moo. P. C. 404. See Wms. on Exrs. 68; *In the Goods of Shadwell*, 2 Robert, 14.[*]

This conclusion has been mainly founded on the judgment of the judicial committee of the privy council, in the case of *Smee v. Bryer*, (6 Moo. P. C. 404.) In that case, the will of the testatrix, Mary Bateman, was written on three sides of a sheet of foolscap paper. At the foot or end of the third and last side of the will, there was a space sufficient to have received the signature of the testatrix, and also the signatures of the two witnesses, if not accompanied by an attestation clause, formally expressed. But neither the testatrix nor the witnesses signed on the third side of the will, immediately at the foot or end thereof; her signature was about half way down the fourth side of the sheet of paper, no part of the will being immediately above it; and with the signature about the middle of the fourth side, was an attestation clause, formally expressed, and signed by two witnesses. The vacancy above the signature on the fourth side, was occupied only by two signatures of witnesses, attesting an interlineation. And it was determined by the judicial committee of the privy council, that the will was not signed at the foot or end.

[*] In the case of *The Goods of Whittle*, 2 Robert, 122-3, Sir H. Jenner Fust remarks, "Unfortunately, cases involving the question whether the will is 'signed at the foot or end thereof' multiply apace. I confess I know not what to do with them. * * * The solution offered by Mr. Justice Williams, in the last edition of his work on executors, does not afford much assistance for what is a 'reasonable' or 'an unreasonable space'." There are cases involving this question in 2 Robertson's Ecclesiastical Reports, pp. 172, 114, 116, 122, 134, 126, 139, 140, 173, 179, 180, 182, 189, 194, 196, 197, 199. See, also, *Jermyn v. Hervey*, 15 Jur. 184; 1 Eng. L. & Eq. Rep. 688. In *The Goods of Anderson*, 15 Jur. 92; 1 Eng. L. & Eq. 684, a note to these cases, containing an able examination of the previous decisions, concludes as follows:

"The result, therefore, would appear to be, that where the testator has placed his name below the dispositive part of the will, and on the same side, the signature will, generally speaking, be well placed. The same rule will apply where he has signed below, and on the same side with the *testamentum* clause. And, lastly, that where the signature is below the attestation clause, but not on the same side with the conclusion of the dispositive part of the will or *testamentum* clause, the will is not duly signed, unless the attestation clause follow the conclusion of the dispositive part or *testamentum* clause immediately, and without leaving a space for the signature of the testator."

tator's name shall write his own name as a witness to the will; but there is not anything in it which requires that there shall be more than one other witness.

The general rule applicable to the provision in question, so far as one can be ascertained, is admirably considered in the sensible and just remarks of Dr. Lushington, setting for Sir Herbert Jenner Fust, on pronouncing judgment in the two recent cases decided together, of "*The Goods of Smith*" and "*The Goods of Cooper*," 16 Jur. 178.

"In construing an act of Parliament," says that eminent jurist, "it is most desirable, where practicable, to ascertain the reasons which induced Parliament to pass such an enactment, and where that can be done without a violent construction, to give such a meaning as the legislature intended, in consequence of the reasons on which the act passed. Where no reason can be ascertained, of course the words must be followed according to their most plain and obvious meaning. In the judgment I am about to pronounce upon these two papers, I wish it to be most distinctly understood, that I have not the remotest intention of departing from any decision of the judicial committee, or of this court. I am bound to follow the one, and I should indeed be sorry, occupying this chair temporarily, to depart from the opinions of the other. If, therefore, in pronouncing the present decision, I should be considered by any so to depart from prior decisions, I beg leave to declare that if I do so, it is an involuntary error, and not the result of intention. Two reasons alone have been assigned for this enactment; that the will shall be signed at the foot or end thereof by the testator, or some other person in his presence, and by his direction. One is, that a signature anywhere might not be deemed a signature within the meaning of the act; a very wise provision, considering how grievously the Statute of Frauds was, at one time, misconstrued in that respect; I mean that the heading, "I, John Thomas," at the beginning, was regarded as equivalent to signing; and considering that no signature, save at the end, could attest what was the conclusion of the instrument. The other reason, if I may conjecture, is to prevent additions to instruments, made even by the testator himself, after execution; a very good reason, but an inefficient enactment to answer the object, because we all know that there is nothing to prevent blanks being left in the body of the will, which may, if the testator choose to run the risk, be filled up at any subsequent period. But though the enactment in itself may not be sufficient for all purposes intended to be effected, and though it may be imperfect, still I apprehend it should not be shorn of its full effect, so far as it does extend to remedy any mischief of subsequent insertion. And, therefore, wherever a blank is left before the signature, which would manifestly be calculated for the reception of further bequests, that signature is a signature within the mischief against which the statute provided, and the will, I am inclined to think, is not entitled to probate. The intention of the testator cannot be a subject of inquiry, *dehors* the instrument itself. We can only look at the instrument itself, to understand what the testator meant, intended, or might have done. If the act produces the evil, the words of the statute must be adhered to. I am well aware of the extreme difficulty of finding and acting up to a principle in cases like these; but surely, so far as is practicable, we ought to endeavor so to do. If I am not prohibited by prior decisions, it appears to me to follow from this train of reasoning, that I am not to refuse probate to a paper, merely because there was a possibility of the testator affixing his signature on the side where the dispositive part concluded; for, if this was the rule, where was there ever a will so closely written to the conclusion of the side of the paper, that a signature might not be inserted? Again; suppose the attestation clause to follow on the same side, and the testator to sign against the middle of the attestation clause, and yet far below the dispositive part of the paper, no one doubts the validity of this execution. But why should this be a more valid execution than a signature written opposite to the attestation clause on the other side of the paper, where no interval of any extent is left on the preceding side? What reason is there for this? What principle to support the distinction? Is there not as much room for fraud in the one case, as there is in the other? Surely, if I may be allowed to say it, we have not dealt fairly altogether by this act; we have introduced too much refinement, and too much technicality. We have busied ourselves with discussions as to the dispositive part, and the *testimonium* clause, and the attestation clause, and forgotten that this was a statute made for every day use, for the whole people of England, literate and illiterate, learned and unlearned, for wills made, not merely in the enjoyment of full health and strength, and vigor of body and mind, but wills made under circumstances the most opposite—wills made on death beds. This is an act to remedy admitted evils, and it ought not to be converted into an act, the better to secure intestacy. Then what is the principle, if I may venture so to designate it, that I should be inclined to apply if left to the exercise of my own judgment, to the interpretation of this act? It is a common sense meaning; a meaning intelligible to the great mass of the community; not a construction elicited by ingenious refinement, or founded on reasoning from technicalities, which the people cannot comprehend. I desiderate a construction which

It would seem from the express words of the statute, that it would not be sufficient if the party signing for the testator should sign his own name, and not that of the testator. The only case in which a subscription otherwise than by the testator is recognized, is where a person shall sign *the testator's* name to the will by his direction.(r)

(r) Under the English statutes, 1 Vict. ch. 26, sec. 9, which requires that the will shall be signed at the foot or end thereof by the testator, it is sufficient, it seems, if the testator write his initials to the will. *In the Goods of Savory*, 15 Jur. 1042; 6 Eng. L. & Eq. Rep. 583.

may *bona fide* carry out the act, and afford a remedy for the evils intended to be prevented, but not go further. To reduce this principle into practice, I am inclined to consider that every signature to a will is sufficient in law, where an ordinary person, intending *bona fide* to carry out the directions of the statute, would, in conformity with the dictates of common sense, place that signature, not attempting to give to the words 'foot or end' a more extended meaning than this, what might be fairly deemed the conclusion of the will; not holding all the world bound to know what we know, that the attestation clause is not the dispositive part of the will, taking, however, especial care not to carry this too far; taking care that no blank be left, either intentionally or otherwise, between the will and the signature, on which it could reasonably be supposed the testator intended to write, or any other person might write; no interval, except such as must necessarily occur from the impracticability of writing the attestation clause on the same side. I adhere more strictly to this opinion, because it is obvious that much risk of mischief may occur, where all is on the same side of the paper, by placing the attestation clause a little lower than the dispositive part of the will; and I must declare, that in such a case, where such a blank was purposely left, I should doubt the validity of the execution."

And after reviewing the previous cases on the subject, and particularly the decisions in *Smee v. Bryer*, (6 Notes of Cases, 20; 13 Jur. 289. 6 Moo. P. C. 404; *Supra*), and "*In the Matter of Shadwell's will*," (2 Robert, 140,) the learned judge proceeds to declare his judgment upon the cases in hand, as follows: "I must now look to the documents before me on the present occasion; that is to say, the case of Edward James Lloyd Cooper, and that of Peter Smith. I will take the case of Peter Smith first. Now looking at the paper, it is so written as to fill up entirely the whole of the first side of the paper, the whole of it. I do not say that a signature could not be crammed into the bottom—undoubtedly it could; and where is the case in which you could not cram in a signature? And may not names be of different lengths, and handwriting of different sizes? How are you to measure the question of validity? By the question of the possibility of cramming in a signature in the first side? I think that would be straining the statute, and making it become one of great oppression. Then, that being so, the testator on the next side, as near as he could conveniently, makes a regular attestation clause, and close opposite that signs his name, with two witnesses. I am very clearly of opinion, that in pronouncing for the validity of the paper, I carry the act into execution to the full extent of what the legislature themselves intended, and that I violate no prior decision or principle, or any judgment delivered by those who have presided in this chair. Now, I come to the next, and that is the case of a gentleman of the name of "Edward James Lloyd Cooper." It differs in this respect, there being rather a larger space left at the bottom of the second side than there was on the first side in the case I have just disposed of; and certainly, so far, there is greater probability of the mischief intended to be remedied, namely, the possibility of subsequent insertion. But was this left either with a view to subsequent insertion, or is it wholly unaccounted for? Because, if it is not satisfactorily accounted for, I admit the effect would be to invalidate the signature on the other side. What is obviously the result? The result is, it is written in a long straggling hand, and the attestation clause follows on the third side. It is clear it could not be got in on the second side; therefore, the blank is completely accounted for in every possible way, because it is obvious from a sight of the paper, what the intention was in going on with the attestation clause there. Then follows the signature of the deceased at the bottom of the attestation clause, and then come the signatures of the two witnesses. I must say, in my opinion, it is signed *bona fide* at the conclusion of the will. I know it is not signed at the end of the dispositive part of the will, and I do not know that the legislature required it when they used the words "foot or end." They mean to use these words in common parlance; they mean what the ordinary understanding of mankind would believe to be the foot or end. I think that this paper is executed so as to come within the rule and meaning of the statute. Let me guard myself against all misconstruction. If there be a blank left which cannot be accounted for on the face of the paper itself, that would not be sufficient; but if there be a

It is not necessary that all the sheets or papers, of which a will consists, should be signed by the testator, or that they should all be connected together. It is enough if they were in the same room where the execution took place, and it must be presumed, *prima facie*, that they were so.^(s)

And the absence of a paper referred to in a will, as containing some of the testamentary intentions of the testator, will not vitiate the execution of the will. Thus, in *Thompson v. Quimby*,^(t) by a clause in the will, the following provision was made. "All such household furniture, jewelry, chemical and other apparatus, which is specified or enumerated in a certain schedule accompanying this, my will, and which is signed by me, I give and dispose of to the respective parties named in said schedule, and in the proportion as therein designated." It appeared that the schedule referred to in the will, was not attached to the instrument at the time of execution, or subsequently. Something was said concerning it when the decedent was about signing the will, and the idea was advanced that it might be annexed afterwards, but the proceeding was not interrupted, and he called on the witnesses to attest, and declared the instrument to be his will, notwithstanding the schedule was not ready. It was held, that notwithstanding one of its provisions looked to another instrument and other gifts, that circumstance did not affect the integrity of the will as a complete act then accomplished, and that the appending of a schedule intended to effect-

(s) 4 Notes of Cases, 620, 639, Wms. on Exrs. 71.

(t) 2 Bradf. Surr. Rep. 449.

blank left which can be accounted for by reason, that the attestation clause written in the same hand could not be got in, I should not reject the paper." * * * "I do think that in all these cases, the evil the legislature intended to prevent, should always be borne in mind, and that every signature, wherever placed, should be sufficient, although a blank or interval, reasonably accounted for by the paper itself appears."

Although few cases have arisen under the Revised Statutes, involving the questions discussed in these English cases, yet it is believed that this view of the principles of construction applied to the English act framed in the particular in question, in substantially the same words as that of this state, [*] will not prove altogether without value.

Upon the question whether a signature in the attestation clause is sufficient in a case (*In the Goods of Woodington*, 2 Curt. 321) where the testatrix wrote her will herself, and it concluded thus: "signed and sealed as, and for the last will and testament of me, Catharine Eliz Thicknesse Woodington, in the presence of us, Thomas Hughes, Ellen Hughes;" and there was no other signature, probate was allowed to pass, Sir Herbert Jenner Fust holding this to be a signature at the foot or end of the will, the deceased having written the whole will, and having acknowledged the will to be her's before the two witnesses. But in another case, (*In the Goods of Chaplyn*, 4 Notes of Cases, 469,) where there was an attestation clause, all in the handwriting of the deceased in this form; "signed by the within named Joseph Chaplyn, the testator, in the presence of us," &c.; and there was no other signature by the testator, a motion for probate was denied by the same learned judge, on the ground that this was not a signature within the true construction of the act, and the case was distinguished from that just stated, (*In the Goods of Woodington*), because in that, the attestation clause contained the words "of me," and it was sworn by the witnesses, that they believed the deceased did intend this to be her signature to the will, whereas in the present case, there was nothing but "signed by the within named Joseph Chaplyn." See *Williams on Executors*, 68; *In the Goods of Richard Dinmore*, 2 Robert's Ecclesiastical Report.

[*] The English statute, by requiring the testator to sign, is compelled to specify the foot, in order to designate at which end of the will the signature must be made. This specification is not necessary in the statute of this state, as the term *subscribe* limits the signature to the last end. The two provisions are exactly identical in meaning.

uate the objects of one of the clauses, or the failure to append it, could have no effect upon the question of the due execution of what was at the time signed, declared and attested as the last will.

References may be made in a will to another document, for purposes of description, but there can be no valid testamentary dispositions unless contained in the will; and the testator cannot in his will reserve the power of giving, or declare that he does give by an instrument not formally executed according to the provisions of the statute. Accordingly, it was considered in the case last cited, that the schedule it was proposed to attach to the will, as well as the clause in the will referring to it, would have been void, even had the schedule been annexed.^(u)

The second subdivision of the statute prescribes, that the subscription at the end of the will shall be made by the testator in the presence of each of the attesting witnesses,^(v) or shall be acknowledged by him to

(u) But if the schedule had been prepared and annexed, or present at the time of the execution of the will, it would have formed a part of the will. See on this subject, *In the Goods of the Rev. George Hunt*, 2 Robt. Eccles. Rep. 622.

(v) What shall be a sufficient subscription of the will by the testator in the presence of the witnesses, has never been made a question under the statute. The English statute requires that the signature to the will shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time. In *Nodding v. Alliston*, (14 Jur. 904, 2 Eng. L. & Eq. 594,) which was a case under that statute, a paper was propounded as the will of John Howe, deceased, and the two subscribing witnesses, and the writer of the paper were examined. The first subscribing witness deposed, that on his going into the room where the alleged execution of the will took place, he found the deceased and the other subscribing witness, and the writer of the paper; that the writer of the will passed it to the deceased, saying, "witness," upon which the deceased wrote the word "witness" on the left hand side of the paper; and the writer of the will then pointed to the paper and said, as though speaking to the subscribing witnesses, "sign," upon which they both signed their names, and left directly; that he had no idea what the paper was, and could not tell by its appearance, for it was folded over, and he saw no writing on it except the word "witness;" and that the deceased did not sign in his presence, and he could not have seen him sign unless he had gone right into the room, as the door opened inwards, and the deceased sat behind the door. The other subscribing witness deposed, that he came into the room first, and that the deceased signed his name before him, but whether in the presence of the other subscribing witness, he could not tell; and that after the deceased had so signed his name, it was suggested to him that he should write the word "witness," whereupon the deceased took and wrote the word "witness," under which the witnesses wrote their names. This witness also deposed, that whilst the deceased was signing his name, he saw writing above the signature, but that, when the witness signed his own name, he saw no writing except that of the word "witness," neither the signature of the testator, nor any part of the writing being visible, because that half of the paper was turned downwards, and the other half then turned upwards was blank, except the word "witness" on it.[*] The writer of the will deposed, that upon the subscribing witnesses coming into the room, the deceased told them that he wanted them to witness his signature, not saying what the document was; that nothing passed as to the contents or nature of the document in their presence; that the deceased in their presence signed his name at the end of the will, and they put their names to it under the word "witness," which the deceased had written at the deponent's suggestion, and in their presence. He had no doubt that they were both present when the deceased wrote his name, but they came in separately, and the thing was done rather in a hurry. Sir H. Jenner Fust pronounced judgment in the case, as follows, (after stating the substance of the evidence:) "Mere presence of the witness in the room, without any knowledge on his part of what may be going on, is clearly not sufficient to make a good execution; and as the first witness deposes that he never saw the deceased sign his name, and never saw the signature, the court cannot hold that the will was executed in the presence of two witnesses present at the same time, and the case falls short of the required proof. No doubt cases may occur as in *Blake v. Knight*, (3 Curt. 547,) where circumstances will lead the court to pronounce against the belief or deposition of the witness, but this is not a case of that kind; I must pronounce against the will."

*The paper was folded from top to bottom; the writing and signature being all to the right, and the word "witness" to the left of the fold.

have been so made to each of the attesting witnesses. This, of course, does not mean in respect to an acknowledgment that the testator shall acknowledge to the attesting witnesses, that he has subscribed the will in the presence of the attesting witnesses, although such would be a literal interpretation of the language used. An acknowledgment of the subscription merely is what is intended to be required. By the fourth subdivision, there must be at least two attesting witnesses.

The question does not seem to have been raised, whether an acknowledgment of the subscription was intended to be effectual in any other case, than where some other person had signed the testator's name to the will by his direction, as impliedly authorized by the 41st section; but there is little doubt that the statute means, that whether the subscription be made by the testator, or by another person by his direction, if it be acknowledged by the testator in the presence of the witnesses, the execution shall be good.

A more difficult question hereupon arises in cases where the subscription is not made by the testator, in the presence of the attesting witnesses, as to what shall be a sufficient acknowledgment of the subscription by him in their presence. The case of *Chaffee & Chapman v. The Baptist Missionary Convention of the State of New York*,^(w) turned upon this question. In that case, the will purported to have been signed with the name of the testatrix, and sealed; it had in addition, an attestation clause, by which the subscribing witnesses were made to certify that it was signed, sealed, delivered and published by her, to be her last will and testament, in their presence; and that they had thereto subscribed their names as witnesses, in her presence, but without stating that it was done at her request. One of the subscribing witnesses, however, swore positively, that he and the other witness subscribed it at her request, though the latter could not recollect whether she requested him to sign it or not. Neither of the subscribing witnesses knew whether the testatrix could write; but it appeared from papers in the surrogate's office, relative to the administration of the estate of her deceased husband, that she signed the bond, oath, inventory, &c., by making her mark only. The person by whom the will had been drawn, was dead at the time it was offered for probate. The subscribing witnesses were alone with the testatrix at the time the supposed execution of the will took place. They testified that when they went to the decedent's room, she took the instrument, which then had her name to it, out of her drawer, and putting her finger on her name, said, "I acknowledge this to be my last will and testament," or words to that effect. But she did not admit, in the presence of the witnesses, that she had subscribed her name to the will, or that it had been subscribed thereto by any other person by her direction. It was held by the Chancellor, on appeal, reversing a decision of a circuit judge and affirming a decree of a surrogate, that the will was not duly executed, for want of a subscription or acknowledgment of a subscription by the testatrix in the presence of the attesting witnesses. "There was no evidence here," says the Chancellor, "that the name was subscribed to this testamentary paper by the direction of the

(w) 10 Paige, 85.

testatrix, or even in her presence. And for aught that appears to the contrary, the will may have been brought to her precisely in the form in which it appeared when she took it out of the drawer. She did not admit to either of the witnesses that she had subscribed her name to the will, or say that any other person had written it there in her presence, or by her direction. On the contrary, one of the witnesses swears that he did not hear her say anything about who wrote the name; and the other says nothing on the subject. The attestation clause states that the will was signed by her in the presence of the witnesses; but this is contradicted by the testimony of both of these witnesses. The putting her finger upon the part of the will where the seal was, and acknowledging that the instrument was her last will and testament, was merely a compliance with the directions of the third subdivision of the 40th section, which required her to declare the instrument which she asked the witnesses to attest, to be her last will and testament. But it did not supersede the necessity of an actual subscription, in the presence of the witnesses, or an acknowledgment to each of them that she had previously subscribed it or had directed some other person to sign it with her name, which appeared thereon. In *Remsen v. Brinckerhoff*,^(x) Chief Justice Nelson, after stating the four requisites to a valid execution of a will, under the provisions of the 40th section of the Revised Statutes on the subject, says "it is obvious that any one of these four requisites, in contemplation of the statute, is to be regarded as essential as another; that there must be a concurrence of all to give validity to the act, and that the omission of either is fatal." And as the will in that case was pronounced invalid, although subscribed by the testatrix in the presence of the attesting witnesses, for want of due publication in their presence, so in this it must be declared not to have been duly executed, because it was not subscribed by her in the presence of the witnesses, as is erroneously stated in the attestation clause; and because there is no proof that she acknowledged in their presence, that her name subscribed to it was put there by her, or by her direction, or in her presence."

This case is undoubtedly to be regarded as an authority upon the law of this state, relative to the execution of wills. It should be noted, however, that the great weight of the decision rests upon the single circumstance, that upon the evidence the subscription was not made by the testatrix, but as she could not write, must have been made by some other person. In England, under the Statute of Victoria, which requires that the signature of the testator "shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time," &c., the result of the cases appears to be, that where the testator produces the will, with his signature visibly apparent on the face of it, to the witnesses, and requests them to subscribe it, this is a sufficient acknowledgment of his signature. But not where his signature is concealed from the witnesses.^(y) Where, however, it is

^(x) 26 Wend. Rep. 331.

^(y) *Chambers v. Queen's Proctor*, 2 Curt. 415; *Gove v. Garwin*, 3 Curt. 157; *Gaze v. Gaze*, Id. 451; *Blake v. Knight*, Id. 547; *Keigwin v. Keigwin*, Id. 607; *In re Davis*, Id. 748; *In re*

proved or is to be presumed from the testimony, as in the case under consideration, that the decedent was unable to write, a greater degree of rigor and exactness is properly demanded. The object of the sta-

Ashmore, Id. 756. See also *In the Goods of Warden*, 2 Curt., 334; *In the Goods of Philpot*, 3 Notes of Cas. 2; *Jauncey v. Thorne*, 2 Barb. Ch. Rep. 61, 62, 63. For a different view of the subject, see 2 Curt. 326; Id. 863. In *Nott v. Guege*, (3 Curt. 160,) Sir Herbert Jenner Fust says: "it is not necessary that the testator should state to the witnesses that it is his signature; the production of a will by the testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present statute." But it is not sufficient merely to produce the paper to the witnesses, where it does not appear that the signature of the testator was affixed to it at the time. 3 Curt. 181. The signature must not be concealed from the witnesses. *Nott v. Guege*, 3 Curt. 160; 4 Moo. P. C. C. 265; *Hudson v. Parker*, 1 Robert. 14. See also 6 Notes of Cases Suppl. p. 1; 3 Notes of Cases, 275; Wms. on Exrs. 75.

The following recent case, which as it is brief, is extracted entire from the report, (2 Robertson's Eccles. Rep. 577,) shows the views of an English court, under their statute, upon the sufficiency of the acknowledgment of the decedent's signature to a will, under circumstances in many particulars similar to those in *Chaffes v. The Baptist Missionary Convention*.

IN THE GOODS OF CHARLOTTE ELIZABETH IVES BOSANQUET, DECEASED.

Miss Bosanquet died on the 4th July, 1852, leaving a will bearing date the 15th November, 1850. She did not name any executor. The will was thus signed:

"CHARLOTTE ELIZABETH IVES BOSANQUET."

"Signed in the presence of"

Beneath the above were the signatures of the attesting witnesses, Miss Sotheby, since deceased, and her servant, Jane Roberts, who gave, in her affidavit, the following account of the transaction: "That on one day, which she believes was on the 15th of the said month of November, 1850, after having assisted the said Miss Sotheby from her bedroom down to the drawing-room, which was her custom to do, as she, the said Miss Sotheby, was very infirm, the said Miss Sotheby requested the deponent to stay in the room, as she wanted her, she said, to put her name to Miss Bosanquet's will, which she had then before her. That the deponent on referring to the said paper, saw that the names and words "Charlotte Elizabeth Ives Bosanquet, signed in the presence of," had been written on the said paper, in manner and form as they now appear. And she further saith, that the said deceased, who was then present in the room, did not sign her name in the said paper, or acknowledge her signature thereto in the presence of the deponent or of the said Miss Sotheby, but that the said Miss Sotheby wrote her name to the said paper in the presence of the deceased and in the presence of the deponent, and thereupon she, the said deponent, according to the directions of the said Miss Sotheby, subscribed her name to the said paper, in manner now appearing thereon in the presence of the deceased, and in the presence of the said Miss Sotheby."

The affidavit gave no information respecting the handwriting on the paper beyond what is above stated.

Jenner moved for administration with the will annexed.

Judgment. SIR JOHN DODSON:—I think as the testatrix was assenting to the transaction, probate may pass. She did not, it is true, in words state the signature to be hers; still I conceive there was a virtual acknowledgment thereof: she was in the room with the will lying open before her. The memorandum likewise at the bottom of the page, though it cannot be proved as a part of the will, since it is underneath the signature of the testatrix, tends likewise to establish an acknowledgment on her part. [*]

Where, however, the name of the deceased had been signed to his will at his request by the drawer thereof, who on a subsequent day, asked, at the request of the deceased, two persons, called in by the deceased himself to attest his will, all being present together at the same time, to sign their names as witnesses, which they did, and the deceased then placed his seal on the paper and said, "I deliver this as my act and deed," it was held that the signature was not acknowledged by the deceased in the presence of the witnesses. *In the Goods of John Summers*, 2 Rob. Eccles. Rep. 295.

[*] The memorandum referred to, was, according to the affidavit, written after the execution, and is in these words: "I request that the plainest and most inexpensive funeral may be made for me, but that I may be buried at Willenden, or at least that I may not be buried at Moosden."

witnesses, and Hughes declared with a good deal of confidence that nothing was said in the store about his having signed it.

The surrogate refused to admit the will to probate, on the ground that the testator had not subscribed the will or acknowledged his subscription thereto in the presence of the attesting witnesses. But on appeal the decree of the surrogate was reversed and probate was ordered; and Mr. Justice Taylor, delivering the opinion of the general term of the Supreme Court, puts the decision upon the ground that the reading of the attestation clause, under the circumstances testified to by the witnesses, was such an acknowledgment of the subscription of the testator as to satisfy the statute.

"Hughes," says the learned justice, "was acting in the matter avowedly as the friend or agent, and at the request of Patterson. Let us suppose, then, that Patterson had done for himself what Hughes did for him, and this in accordance with the law maxim, founded upon good reason and good sense, *qui facit per alium facit per se*.

"Patterson then would take the will in his hand, and to call attention to it, declare it to be his last will and testament; then read the attestation clause, 'signed, sealed, published and declared by me to be my last will and testament,' and then request the witnesses to affix their names. Could any one in that case gainsay the acknowledgment of Patterson, as being fully sufficient to meet the requirements of the law? I think that the reading of that clause in the manner proved in the presence of the testator as well as the witnesses, followed by his affirmation that it was his last will and testament, was a complete fulfilment of the requirement of the 2d subdivision of the 40th section of the statute.

"In this view of the case I am fully sustained by Senator Verplanck, in giving his opinion in the case of *Remsen v. Brinckerhoff*.^(d) 'Here,' says the Senator, 'the evidence shows conclusively that the testatrix made no verbal declaration to the witnesses, did not cause them to read any written declaration, nor in any other way render it clear that she might not have thought the instrument signed and acknowledged was a deed or lease instead of a will. There was at the end of the instrument an attestation clause, setting forth in the customary form, that the testatrix 'acknowledged to each witness that she subscribed the same and declared it to have been her last will and testament.' This, if the witnesses had been asked to read it by the testatrix, or in her hearing, would have been a silent but clear declaration.'

"Now this very thing, though in other words, yet words of the same import, which the senator says would have been a silent but clear declaration, happened in the case before us. The case, also, of *Burdett v. Doe* dem. *Spilsbury*, (7 Scott's New Rep. 66,) goes very far to sustain the same view.

"The decree of the surrogate of Monroe county must be reversed, and the surrogate ordered to take probate of the will."^(e)

(d) 26 Wend. 338.

(e) The point, it is apprehended, is not very closely reasoned by the learned justice, and it may admit of some question whether the mere reading of an attestation clause, such as that attached to this will, could in all cases be regarded as a sufficient acknowledgment of a previous subscription.

In a case (f) where, in respect to one of the two witnesses, the subscription by the testator was not in his presence, and there was not any acknowledgment in his presence, this was considered a fatal defect in the execution of the paper.

The statute does nowhere specify the particular mode or form in which the acknowledgment shall be made. It is not required to be done in words; but in the case of a mute or other person who cannot articulate or write, it may be expressed by signs. (g)

The statute requires that the subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to each of the attesting witnesses. If the testator subscribe the will in the presence of the witnesses, it must be subscribed in the presence of each, that is, of both or all of the witnesses. If the testator acknowledged his subscription to the will, such acknowledgment must be made to each, that is, to both or all of the attesting wit-

(f) *Rutherford v. Rutherford*, 1 Denio, 33.

(g) *Whitbeck v. Patterson*, 10 Barb. S. C. Rep. 610, per Taylor, J.

One object of the attestation clause to a will is to provide a memorandum to aid and assure the recollection of the witnesses, when they are called upon to testify as to what transpired on the occasion of the execution. In the case in question the witnesses proved, however, as it was entirely competent for them to do, a different state of facts from that certified to by them in the attestation clause. The will was not signed by the testator in the presence of the witnesses, although the attestation clause makes the witnesses so declare, and the learned justice misquotes the attestation clause, when he puts into the mouth of Patterson the words "signed, sealed, published and declared by me to be my last will and testament," omitting the important continuing words "in the presence of us," &c., or supposing the testator to speak "in the presence of you," &c. As Hughes read the attestation clause to the testator and the witnesses, they must all have perceived, if they attended to it at all, that in respect to the signing it embodied a falsehood, the testator having already signed the paper in a different place, and not in the presence of the witnesses. That statement being untrue, as proved by the testimony, no conclusion, it is submitted, in respect to any fact involved in the false statement, can be founded upon it on the ground of the tacit assent of the testator. The reading, therefore, of the attestation clause, as testified to by the witnesses, containing a statement as to the signing directly at variance with the facts attending the transaction, cannot, it is apprehended, be properly regarded as having any decisive bearing upon the sufficiency of the compliance with the statutory provision requiring subscription or acknowledgment. That the reading of the attestation clause may amount to a publication of a will, as intimated by Senator Verplanck in *Remsen v. Brinckerhoof*, is apparent, because the mere reading of a statement declaring a paper to be a will, either by or in the presence of the testator, by his direction or assent, is of itself a publication. And if the attestation clause in the case in question had recited an acknowledgment of the subscription instead of a signing in the presence of the witnesses, the analogy between the case and the case put by Senator Verplanck would have been perfect, and the reading of the attestation clause, under the circumstances testified to by the witnesses, would have been a complete acknowledgment of the subscription. However, in the case under consideration, the facts and circumstances proved by the witnesses, conclusively establish the sufficiency of the acknowledgment. The signature of the will by the testator; his producing the will to the witnesses with his signature visibly apparent on the face of it, [*] his declaring it to be his will and requesting the witnesses to sign it, all demonstrate, independently of the statement in the attestation clause, that he designed the witnesses to understand that he acknowledged the subscription. See also *Jamney v. Thorne*, 2 Barb. Ch. Rep. 40, which, however, was a case under the law previous to the Revised Statutes.

*The reporter, in the head note to this case, says: "None of them [the witnesses] saw the inside of the will, or the signature of the testator, nor did they know what it contained." Although Mr. Justice Taylor, in his summary of the testimony, does not expressly say that the witnesses did see the signature, the inference to which his statement leads is, that the subscription of the testator was open and visible to the witnesses at the time of the attestation. If this decision is to be understood as determining that there may be a sufficient acknowledgment of a subscription without the witnesses' seeing or having permission or opportunity to see the signature, it will form a peculiarity in the judicial commentaries on this statute.

nesses. In contemplation of the statute all the acts requisite to the due execution of a will are to be done at the same time.^(h) In the case of a subscription, both or all the witnesses, from the physical necessities of things, must be present on a single occasion. There cannot be a subscription in the presence of each of the attesting witnesses, unless it be in the presence of both or all at the same moment. And it is reasonably to be inferred that in the case of an acknowledgment, it must be an acknowledgment before both or all of the witnesses present at the same time.⁽ⁱ⁾

It is a just conclusion, from the drift and tenor of the whole section taken together, that it was not within the intention of the legislature to authorize the execution of a will piecemeal or by instalments. It is certainly all one transaction in the case of a subscription, and no good reason is apparent why it should be split up and divided in the case of an acknowledgment. A subscription in the presence of one of the attesting witnesses, and an acknowledgment in the presence of another, is not permitted; and the same objection which would preclude such an execution of the will, obviously lies against two or more separate acknowledgments. It was settled, it is true, previous to the Revised Statutes, that a will of real estate attested by three witnesses, who at several times subscribed their names in the presence of the testator, and at his request, was valid, although all the witnesses were never present at the same time. But the then existing statute, by its letter, only required that the will should be signed by the testator, but not that such signing should take place in the presence of the attesting witnesses; and as to the witnesses, it required only that the will should be attested by three witnesses, who should subscribe the same in the presence of the testator.^(j) The alteration in the present statute, distinctly requiring a subscription before at least two witnesses present at the same time as a necessary legal inference, it is supposed, carries with it the same requirement in respect to the presence of the witnesses in the case of an acknowledgment. An important object of the statute is to prevent fraud or deception, and this is more effectually promoted by requiring at least two witnesses to every act connected with the execution of a will, and such is clearly the purpose and meaning to be gathered from all the provisions of this section taken together. In the third subdivision, "the time of making" and "the time of acknowledging" the subscription, are alike spoken of as a single occasion, and the two or more attesting witnesses demanded by the fourth subdivision, are plainly both or all jointly to attest the observance of all the previous requirements.^(k)

(h) *Doe v. Roe*, 2 Barb. Sup. Ct. Rep. 205, per Harris, J.; *Sequins v. Sequins*, Id. 394-5, per Edmonds, J. See also *Keeney v. Whitmarsh*, 16 Barb. 141.

(i) There is an unfortunate note attached to a form of a will in the appendix to the first edition of this work, in which a different view of this question is taken. It is not with a design to disparage the accuracy or value of that publication, that it is now humbly intimated that the present contains many improvements upon that edition. It is the source of some consolation, also, that the view taken of the statute in the note referred to, has received, at the hands of Mr. Justice Hand, a judicial approval and sanction. See *Butler v. Benson*, 1 Barb. Sup. Ct. Rep. 533.

(j) See R. L. 1813, 364, sec. 2; *Jauncey v. Thorne*, 2 Barb. Ch. Rep. 56, and cases cited.

(k) In *Butler v. Benson*, however, (1 Barb. Sup. Ct. Rep. 533,) Mr. Justice Hand lays down

Of the Publication of the Will.

The third subdivision of the statute provides that the testator at the time of making the subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.

No publication was ever necessary for a will of personal estate previously to the Revised Statutes. The former statutes of wills prescribed that every last will and testament of lands should be in writing, and signed by the party making the same, or by some other person, in his presence and by his express direction; and should be attested and subscribed in the presence of such party by three or more credible witnesses, or else such last will and testament should be utterly void.^(l) But nothing was said as to the publication of the will, by the testator, in the presence of the witnesses or otherwise. The question therefore arose, whether the adoption of the formalities required by the statute, dispensed with the necessity of the publication of the will, which was necessary previous to the statute; and if not, whether it was necessary that such publication should be made by the testator in the presence of the three witnesses who attested the will. The weight of authority in England, is, that under the 29 Car. II, ch. 3, sec. 5, (of which the old statute of this state concerning wills was a copy,) no publication by the testator, in the sense declared by the Revised Statutes, was required as essential to the validity of the will; and this, it may be considered, was regarded as the law of this state before the Revised Statutes, though it does not appear that the attention of the courts was ever drawn to the particular point in any of the cases.^(m)

It was doubtless the contrariety of opinion and uncertainty upon so important a subject of the law, which induced the legislature of this state in 1830, while revising the law, to declare with explicitness the necessity of publication to give validity to the will, and which led, in England, to the Act of 1 Victoria, ch. 20, in 1837, by which any other proof of publication is dispensed with, except what arises from the act of signing or acknowledging the instrument in the presence of the witnesses. Both statutes were intended to settle the law, which is un-

a different doctrine on these points. In giving what he denominates as "perhaps a pretty correct summary of the requirements of our statute," after stating the preliminary requirements of the statute, he declares that "this subscription must be made in the presence of the attesting witnesses, or the making of such subscription must be acknowledged to them. If by acknowledgment, that may be made to the witnesses separately, or he may subscribe and publish in the presence of one, and acknowledge, &c., before another." But the case before the learned justice did not involve the construction of this provision of the statute, and his opinion plainly is pronounced upon an incorrect version of the section. The requirement is that the subscription or acknowledgment, whichever shall be the form of execution adopted, shall be in the presence of *each* of the attesting witnesses. Upon the question whether the acknowledgment may be made to the witnesses separately, the opinion and dictum of the learned justice is certainly entitled to the most respectful consideration. A subscription in the presence of one of the attesting witnesses, and an acknowledgment in the presence of another, as approved by the learned justice, is neither a subscription in the presence of each, nor an acknowledgment in the presence of each, and if the words of a statute are at all to be trusted as a guide for its construction, it is submitted, is not, therefore, a compliance with the section.

(l) 29 Car. II, ch. 3, sec. 5, 1 R. L. 1813, 364, sec. 2.

(m) *Brinckerhoff v. Remsen*, 8 Paige, 491; *Remsen v. Brinckerhoff*, 25 Wend. 330, and see cases cited.

doubtedly of vastly more importance than that it should be settled in favor of one or the other of the conflicting opinions. The statute of this state followed the lead of those which maintained that some sort of publication was necessary, while the English statute has dispensed with it.

The revisers, in their report to the legislature upon this branch of the law, recommended the following section to relate to wills of real estate,⁽ⁿ⁾ instead of the present section, which was afterwards adopted by the legislature :

"Sec. 5. No last will and testament of real estate, or of any interest therein, shall be valid unless the same be in writing ; be signed by the testator, or by some other person for him, and in his presence, and by his express direction ; and be attested by three or more credible witnesses, who shall subscribe their names as witnesses in the presence of the testator, and at his request," which was accompanied by a note signifying that it was slightly varied from 1 R. L. 364, 2d section, "in the hope of making it more explicit."^(o)

The legislature, it will be perceived, framed the section, so as to make it apply to wills both of real and personal property, and besides other material alterations, expressly incorporated the provision now under examination.

When the explicit language of the provision in question, is considered in reference to the doubts which existed, whether under the statute of Charles II, an actual publication in the presence of the attesting witnesses was not necessary to the due execution of the will, in connection with the circumstance that the legislature intentionally altered the language of the section in this particular, from that of the old statute, which, as has been seen, was retained substantially in the section as originally reported by the revisers, there is no room for doubt that the law makers intended to require an actual publication of the instrument as a will, in the presence of the subscribing witnesses at the time of its execution, in addition to the other formalities required by the statute. The legal and historical external evidence of the legislative intent, corresponds with and supports the natural and obvious interpretation of the statute itself. The signing of papers purporting to be wills by persons near death, supposing that they signed some other instrument, was a danger such as demanded consideration whether it might not be excluded by positive legislation. This third subdivision then was intended as a statutory declaration of what is understood, in technical language, to be a publication ; it is found in juxtaposition with the requisites of signing and witnesses ; and can no more be dispensed with in passing upon the validity of an execution, as being in conformity with the law than either of these. It prescribes, in general terms, what shall amount to publication. The testator must not only declare the instrument to be his will, but he must so declare at the time of signing or acknowledging ; which act, by the previous clause, is to be done in

(n) Proposing to leave the law substantially as it stood respecting wills of personal property.

(o) See 3 Revised and other Statutes, (2d ed.,) Appendix, 627.

the presence of the witnesses. Such declaration must therefore be made in their presence.(p)

Whether it was wise to require a formality of this kind, resting in the recollection of the witnesses merely where the instrument upon its face purported to be a will, and thereby exposing the intention of the testator to be defeated, by the imperfect or mistaken recollection of the witnesses, that the testator at the time he signed the instrument, did not declare it to be his last will and testament; is a question which it does not properly belong to the courts to decide.(q) And if the fact distinctly and satisfactorily appear, that the testator did not declare to the subscribing witnesses, or in their presence, that the instrument signed by him and attested by them was a will, it is the duty of the courts to carry into effect the expressed will of the law givers, by declaring that such an instrument is invalid as a testamentary disposition of the decedent's property.(qq)

No particular form of words, however, is necessary, even under this statutory provision, to comply with its requirement. The legislature only meant that there should be some communication to the witnesses, indicating that the testator intended to give effect to the paper as his will. Any communication of this idea, or to this effect, will meet the object of the statute. Words equivalent in import and signification, or acts and words together, which amount to a clear and unequivocal declaration by the testator of his intention to execute the instrument as his last will and testament, are sufficient.(r) The testator may do many acts, which may amount to a declaration that the instrument he executes is his will. A man may be unable to speak, and yet may be perfectly competent to make a will.(s) But the declaration is an open act, a manifest signification or assertion, or assent by words or signs; and it must be made to appear by unequivocal circumstances, so that the testamentary character of the instrument is shown to have been communicated by the testator to the witnesses.(t) The minds of the parties must meet on that point. It will not suffice that the witnesses have elsewhere, and from other sources, learned that the document which they are called to attest is a will, or that they suspect or infer, from the circumstances and occasion, that such is the character of the paper. The witnesses cannot spell out the declaration by a hasty glance at a word here and there, or by connecting present acts with previous conversations. The testator must know that the witnesses know the testamentary nature of the act, and *vice versa*; and this mutual knowledge must arise from something said, done, or signified, contempo-

(p) See *Brinckerhoff v. Remsen*, 8 Paige, 498; *Remsen v. Brinckerhoff*, 26 Wend. 325.

(q) 3 Paige, 498; *Ex parte Beers*, 2 Bradf. Surr. Rep. 164; *Wilson v. Hetterick*, Ib. 431.

(qq) In *Brown v. De Selding*, 4 Sandf. Superior Ct. Repts. 17, the court, Mason J., says: "But the Revised Statutes have somewhat altered the rule," (in respect to the publication from what it was previously,) "and the alteration is, we think, wise and salutary. Whether it is so or not, it is our duty to carry out the provisions of the statutes on this subject, in their letter and spirit."

(r) *Torry v. Bowen*, 15 Barb. Sup. Ct. Rep. 304.

(s) In the *Matter of proving the will of Emmanuel Abrams, deceased*, M. S. per Ogden, Surr. N. Y.

(t) *Ex parte Beers*, 2 Bradf. Surr. Rep. 164.

ranecously with the execution of the instrument.^(u) It would be unwise, if not unsafe, to speculate upon the precise mode of communication; as every case must depend upon its own particular circumstances. The statute itself is plain, and may readily be obeyed in a way to leave little or no room for construction. When that is necessary, the only sure guide is to look at the substance, sense, and object of the law, and, with the aid of these lights, endeavor to ascertain whether there has been a substantial compliance.^(v)

One of the earliest decisions in which this provision of the statute was the subject of construction, was that in the matter of proving the last will and testament of Emmanuel Abrams, deceased, before the surrogate of the county of New York, in May, 1840. In that case, both the witnesses testified that the brother of the testator produced the will, and asked the testator whether the signature, which was shown to him, was his signature, and that the testator answered "yes, it is all right;" and that not a word was said at that time whether the paper was a will or not. One of the witnesses said that "he did not know whether the paper he subscribed as a witness was a will or a deed." The other witness said he "did not know that the paper was, at the time of the signature, called anything." "He was led to believe it was a will." "When he and the first witness entered the room, he thought the brother said to the testator, that they had come to witness his will. He did not know that the testator made any reply. He thought the testator heard his brother say they had come to witness his will."

"I think," said the surrogate, "the statute requires that it should be clearly shown by two witnesses, that the testator acknowledged it to be his will, either by so declaring it himself, or by some act showing conclusively that he understood it to be his will; and I think the witnesses must also so have clearly understood it. In this case, one of the witnesses never heard the word *will* mentioned, and did not himself know whether the instrument he witnessed, was a will or a deed; and the other witness inferred it was a will, because he thought he heard the brother tell the testator they had come to witness his will, and he thought the testator heard him say so. I cannot say that the evidence in this case is sufficient to prove that the testator, at the time he acknowledged this instrument, declared it to be his last will and testament, so as to bring it within either the word or the spirit of the statute."

The leading case, however, on this provision of the statute, is that of *Remsen v. Brinckerhoff*,^(w) which was determined in the court of last resort, in the year 1841. This case arose in the court of the surrogate of the county of New York, on a proceeding to prove the last will and testament of Dorothea Brinckerhoff, deceased. The will was signed by the testatrix, in the presence of two witnesses. The attestation clause, to which the witnesses subscribed their names, recited a full compliance with all the requirements of the statute, and in addition at the

^(u) *Wilson v. Hetterick*, 2 Bradf. Surr. Rep. 431; *Lewis against Lewis*, 1 Kernan, 222, 227. See, also, *Burritt v. Siliman*, 16 Barb. S. C. R. 211.

^(v) 26 Wend. 332, 337.

^(w) 26 Wend. 325.

close, stated that the witnesses had, each of them, "written opposite to their names, their respective places of residence," pursuant to the 41st section of the statute. The witnesses were examined before the surrogate of the county of New York; one of them testified that the testatrix executed the will in his presence by writing her name, and acknowledging it to be her hand and seal, for the purpose therein mentioned." That he subscribed his name to the will in the presence of the testatrix; that the will was not read to the testatrix, nor did he (the witness) read it; he read the last line of the attestation. He did not ask the testatrix whether it was her will, nor did she say it was her will, nor was it stated by any person present that the instrument executed was a will. The other witness testified that he saw the testatrix sign the instrument; she did not say it was her will, but said she acknowledged it to be her signature for the purposes therein mentioned. She requested him to sign his name as a witness, and after he had written his name as a subscribing witness, she discovered that he had omitted to write his place of residence, and requested that it should be done. This witness testified also, that he never saw the testatrix previous to the time of her signing the instrument, and remained in the room where it was signed not longer than ten or fifteen minutes. On this evidence, the surrogate admitted the instrument to probate. Some of the heirs and next of kin, appealed from his decision to the circuit judge, of the first circuit, who confirmed the decree of the surrogate. The heirs and next of kin, then appealed to the Chancellor, who, on the 6th October, 1840, *reversed* the decree of the surrogate, and directed the proceedings to be remitted, in order that administration might be granted as in case of intestacy.(x) From the decree of the Chancellor, the executrices named in the instrument propounded as a will, appealed to the Court for the Correction of Errors. That court affirmed the decision of the Chancellor, and determined that the instrument was not well executed as a will, for want of a due observance of the provisions of the statute now under consideration, requiring the testator at the time of subscribing or of acknowledging his subscription, to declare the instrument so subscribed by him to be his last will and testament.

Chief Justice Nelson, in delivering his opinion, recurs to the previous law, and points out the alteration introduced by the Revised Statutes, and after declaring the necessity of a substantial compliance with the new provision, concludes as follows: "But, whatever may be the mode that may hereafter be approved, by which the testator may indicate that the instrument, the witnesses are requested to subscribe, as such, is intended as his will, it is entirely clear nothing to that effect appears, directly or indirectly in the case before us. Not one word, or sign, or even act, passed within the hearing or presence of the witnesses at the time of the execution, tending to this effect. The testimony presents the bald case of an execution, according to the forms of the old law, without at the time adverting to the new provision. The instrument in question cannot, therefore, be upheld, without a virtual repeal of the statute; and though I may not admire the wisdom of the change, but have preferred the solemnities, as I think heretofore understood in this

(x) See 8 Paige, 491, *et seq.*

state, and as have been settled by the recent act in England, we shall unquestionably, best consult our duty, as well as the interest of all hereafter concerned in testamentary dispositions, by giving full force and effect to the statute, fixing thereby, a well known and permanent rule for their guide. I shall, therefore, vote to affirm the decree of the court below."

And Senator Verplanck; in his opinion, after commenting upon the general principles and rules governing the right of testation, and after considering the previous law, and the alteration made by the Revised Statutes, pronounces his conclusions upon the case in question, as follows:

"Here the evidence shows conclusively, that the testatrix made no verbal declaration to the witnesses, did not cause them to read any written declaration, nor in any other way render it clear, that she might not have thought the instrument signed and acknowledged, was a deed or lease instead of a will. There was at the end of the instrument, an attestation clause, setting forth in the customary form, that the testatrix "acknowledged to each witness, that she subscribed the same, and declared it to have been her last will and testament." This, if the witnesses had been asked to read it by the testatrix, or in her hearing, would have been a silent, but clear declaration. But it was not read by them. The appellant's counsel maintained, that knowing the contents of the will, and the concluding attesting clause, the testatrix, when she acknowledged her signature, "for the purposes therein mentioned," made the declaration her own, as much as if she had distinctly repeated it, so that she virtually declared her signing to be for the purpose of authenticating her last will and testament. This might tend to show her intent; and if she had shown that clause to the witnesses, or had it read by another person, and assented to it, that would have been a declaration, a making known her will to the witnesses. But presuming the written attestation to have been correctly understood by the old lady; it was in fact merely a declaration, written to be made known thereafter to others, and not one made at the time to the witnesses." And after adverting to the evidence necessary to prove a declaration, the learned senator proceeds: "Here, however, we have the testimony of the subscribing witnesses themselves, direct and positive, that they did not read this declaratory clause, and that nothing passed that could indicate any intent to inform them that they were witnessing a will, and not a deed or lease. The circumstance of the testatrix having directed the addition of the witnesses' residences to their names, tends to show her own knowledge of the character of the instrument, (though not conclusively,) but proves nothing as to any design of thus indirectly informing others that this was her will, since neither she nor they might know that this was the peculiar mode required by law for the attestation of wills." "This, therefore," says the learned senator in closing, "is incontestably a case where the open evidence of knowledge and intent, demanded by our law, in order to exclude the possibility of delusion or deception, and to authenticate wills, has not been furnished. The will has, therefore, not been proved according to law, any more than if it had but a single witness; and the estate must pass

under the general laws of descent and distribution. I place my opinion exclusively upon this ground."

This judgment has settled the law of this state, that a publication of the will by the testator, by an open, distinct, and intelligible communication at the time of subscription or acknowledgment, is requisite to its due execution. That it is not sufficient that the testator knows that the instrument he is in the act of executing is a will, and understands its contents, but he must convey to others a positive and unequivocal intimation and understanding, that the instrument is his will, and that he knows and executes it as such. The circumstance appearing in the testimony in this case, that the testatrix directed one of the witnesses to write opposite to his signature, his place of residence, a formality not prescribed for the execution of any other instrument than a will, and especially prescribed in that case, raises a strong presumption that the testatrix herself knew, and understood the nature and character of the instrument she was executing. But this decision establishes that the provision of the statute under examination requires more than this, and is not satisfied unless the testator, either directly or indirectly expressly communicate, so that the witnesses may so understand it, the fact that the paper is his will.

Upon this principle, the case of the will of Mungo Currie, deceased, before the surrogate of the county of New York, was decided. In that case, the will was in the handwriting of the testator. One of the witnesses testified that he saw the instrument executed by the testator. It was not written, nor was it read to, or by the testator in the presence of the witness. At the time the will was executed, the testator was in bed. He asked an old woman who was in the room to hand him some papers. From these papers, the testator took out this will. He asked for a pen and ink, and signed it, and asked the witness to subscribe it as a witness. The testator did not say what the paper was, and the witness did not know what it was, but presumed it was a will. After he subscribed it as a witness, Mr. Currie, the testator, said to the old woman in the room, "now do you sign it;" she replied that it was so long since she had written, she did not think she could write her name, but addressing herself to Mr. Currie, she said, "if my daughter sign it, it will answer the same purpose." Mr. Currie replied, "yes, it would." The will was then carried into the front room and signed by the daughter. The witness thought the daughter must have heard what had passed in relation to the paper in the back room; after the will was so signed by the daughter, it was handed back to the testator, who then enclosed it in a letter directed to the executor, and requested the witness to deliver it, which he did accordingly. The other witness testified that her name subscribed to the will as a witness, was her name, that Mr. Currie asked her to sign a paper as a witness; she told him she did not think she could write, and she would let her daughter sign it for her; and the name of the witness to the paper was, as written by the daughter of the witness. She saw Mr. Currie sign a paper, but what it was, she did not know, nor did she know that it was the paper produced. When Mr. Currie had signed the paper, he requested the witness to sign it. After Mr. Currie had signed it, the

witness took it into the front room and got her daughter to write the name of the witness to it. When Mr. Currie handed her the paper he said, "do you sign this;" this was all he said. The word will was never mentioned by Mr. Currie, nor by any other person present at the time.

The surrogate, after referring to, and quoting the case of the will of Dorothea Brinckerhoff, thus proceeds: "Let us now compare the case of Mr. Currie's will with that of Mrs. Brinckerhoff. Mr. Currie's will contains no other attestation clause than this; "sealed, signed and delivered in the presence of these witnesses, and of each other." In that case, as in this, nothing was said by the testatrix about this being a will. In that case the testatrix asked the witnesses to affix to their names their places of residence, which was relied upon as showing she knew it was her will. In this case the will is in the handwriting of the testator. This is also evidence of his intending it to be his will; but in this case, as in that, it is not sufficient to show an execution of the instrument, according to the provisions of the statute. I am compelled by what I deem a proper construction of the words of the statute, and by the case above referred to, to declare that this instrument cannot be admitted to probate as the last will and testament of Mungo Currie, deceased." Upon appeal to the circuit judge of the first circuit, the Hon. William Kent, circuit judge, affirmed the sentence of the surrogate.

So in *Brown v. De Selding*,^(y) where J., one of the witnesses testified that the testatrix, when about to sign the will, inquired "where she must sign the will, and upon the place being pointed out, took the pen and signed;" and Z., the other witness, testified that the testatrix "distinctly asked where the proper place was for her to sign," and both witnesses agreed that besides this inquiry, the testatrix did not say anything, nor was anything said by any other person on the subject of the will at the time the paper was signed. The court, Mason J., after remarking that it is true that the witness understood from what passed, that the instrument was a will, and that such was the understanding of the testatrix also; but that there was no recognition of it as her will in the presence of the witness Z., beyond the simple signature, nor in the presence and hearing of the witness J., unless she used the word "will" when she asked about the place to sign; thus state their conclusions upon the case. "It is fairly to be inferred in the case of Mrs. Brinckerhoff, that all parties also understood the paper to be a will. One of the witnesses put his residence opposite to his name, and the testatrix remarked to the other witness that he had not done so, and required him to do it, which would have been unnecessary in attesting the execution of any other instrument. But yet, the court held the acknowledgment to be insufficient. If we should hold the mere signing of a will, or any act equivalent to it, without any declaration, either before or after signing, in the presence and hearing of each of the witnesses, to be a sufficient publication, we should disregard the plain letter of the statute, which requires that the testator shall, at the time of making the subscription, declare the instrument to be his last will. The utmost that can be said

(y) 4 Sandf. Superior Ct. Rep. 10.

of this case is, that the conduct of the testatrix implied the instrument to be her will. But no declaration of any kind is pretended. We do not see how it is possible to get over this defect.”(z)

The clause of the statute at present under consideration, provides that the testator at the time of making the subscription, or at the time of acknowledging the same, shall declare the instrument *so subscribed*, to be his last will and testament. “The provision,” says Assistant Vice-Chancellor Hoffman, in *Heyer v. Burger*,(a) “seems clearly to require that the declaration must follow the subscription;” and in that case, where, after the will was read over to the testatrix, she was asked whether it was to her wishes, and she replied “yes,” in a very languid tone, and afterwards signed it, by making her mark; and after making the mark, did not speak a word, and had lost the power of articulation completely; the learned Assistant Vice-Chancellor considered that the instrument was void as a will, on the ground that this provision of the statute was not complied with; but the point was not necessarily involved in the determination of the case.

In *Doe v. Roe*,(b) however, this question was expressly determined. This was a feigned issue, pursuant to 2 R. S. 66, sec. 57, to try the validity of the last will and testament of Isaac L. Van Alstyne, deceased. On a motion for a new trial on a bill of exceptions, it appeared that two of the witnesses to the will were sent for at the time of the execution, and when they came into the room, they were told by Dr. Root, the testator's physician, in Van Alstyne's presence, that they had been called in to witness the will. Dr. Root then read the will to the testator, and asked him if that was his last will and testament, to which he replied in the affirmative. The testator then signed the will, and the three witnesses subscribed their names to the attesting clause in his presence. Dr. Root then enclosed the will in a wrapper, and indorsed it, and, by the direction of the testator, delivered it to one of the other witnesses for safe keeping. Upon this case, Mr. Justice Harris, delivering the opinion of the Supreme Court in general term, says: “I cannot doubt that when the testator was asked by Dr. Root, after the instrument had been read to him, whether it was his last will and testament; his reply in the affirmative was a sufficient publication of the will to answer the requirement of the statute. Nor do I regard it as at all material, in what order the various steps necessary to constitute a due execution of a will take place. The publication is required to be *at the time of signing*. The clear intent of the statute is, that the testator shall not sign the will at one time, or on one occasion, and at another time, or on another occasion declare it to be his will. Both shall be done at the same time, on the same occasion; but which shall be done first in the order of time; whether the testator shall declare the instrument he is about to sign to be his last will and testament, or shall first subscribe the paper, and then make the declaration of his purpose, is immaterial. It is enough that the two things are not done at different times.” And after referring to the above quoted remark of Assistant Vice-Chancel-

(s) See also *Grant v. Grant*, 1 Sandf. Ch. Rep. 235.

(a) 1 Hoff. Ch. Rep. 1, 20.

(b) 2 Barb. Sup. Ct. Rep. 200.

lor Hoffman, the learned justice thus proceeds: "But a reference to the case in which the remark was made, will show that the question was not necessarily before the court; and the form of expression used by the Assistant Vice-Chancellor, shows that it was with him a question of first impression, and that he only intended to express such impression. This impression is undoubtedly derived from the phraseology found in the statute. The language is, that the testator shall declare the instrument "so subscribed" by him, to be his last will and testament. The instrument which is to be declared to be a will, it is insisted, must be a *subscribed* instrument. But I think the language of the statute in this respect, may properly be regarded as descriptive of the paper, and not as intended to prescribe any particular, in which the several acts necessary to constitute a valid execution of a will, shall in fact be done. In contemplation of the statute, all are to be done at the same time. Neither of the four acts, which, united, make a valid execution of the instrument, may be done at a different time from the rest. If the instrument has, in fact, been signed at a previous time, then the signature must be acknowledged to the subscribing witnesses, which is deemed to be equivalent to a new signing of the instrument. I am clearly of opinion, therefore, that a will is duly executed when the several acts required by the statute have been performed *at the same time*, whatever the order in which such acts may be severally performed. If this be so, and I am right in my conclusion, that the mode of declaring the instrument to be the will of the testator, was a substantial compliance with the statute in this respect, it follows that there was in this case a sufficient publication."^(c)

A question has arisen upon this clause of the statute, whether the declaration required of the testator, that the instrument is his will, must be made to the attesting witnesses, or in their presence, in such terms, or in such a manner as to enable them to know the fact that it was so made. The plain words of the whole section, and its general policy and intent would seem to leave little room for doubt or construction on this point. After providing for the subscription by the testator at the end of the will, the second subdivision, as has been seen, requires that the subscription or the acknowledgment thereof, shall be made in the presence of each of the attesting witnesses, and then comes the provision in question, that the testator, at the time of making the subscription, or at the time of acknowledging the same, shall declare the instrument to be his will. The purpose of the legislature here apparent, it is conceived, is to demand two or more attesting witnesses to each of the acts connected with the execution. The testator, in the presence of the witnesses, is to subscribe, or to acknowledge his subscription to the instrument, and at the same time to declare it to be his will. The witnesses are certainly to take notice of the subscription or acknowledgment, and it is hardly reasonable to suppose that the legislature could have intended to require a declaration to be made at the same time, which they were not to take notice of. The inference is almost irresistible, that the witnesses are to take cognizance alike of both these acts of the testator. If the testator subscribe the instrument

(c) See also *Keeney v. Whitmarsh*, 16 Barb. S. C. Rep. 141.

in the presence of the witnesses, and at the same time declares it to be his last will, and the witnesses take the cognizance of the one act on the part of the testator, they must necessarily hear or comprehend the other. Whether the particular language used, or sign made, or act performed, amounts to a declaration, is another question, but in what manner so ever the declaration be made, as it is required to be made at the time of the subscription or acknowledgment in the presence of the witnesses, of which they must have knowledge, it would seem to be equally required that they should know or perceive the declaration. It is submitted that the intention and meaning of the legislature to this effect, are distinctly expressed by the language used, and that the section does not need any other or additional words to declare this intention and meaning.

The legislature are to be supposed to have recognized as an indisputable physical necessity, that the testator could not subscribe the instrument in the presence of the witnesses, and at the same time declare it to be his will without the witnesses, if they saw or understood the act of subscription, being informed of the declaration. The fact, whether they were both so informed of the declaration, may depend for its proof upon testimony other than that of the attesting witnesses themselves. But where, for instance, the testator so executes the will as that only one of the witnesses understands or notices the declaration, and the other denies such understanding, or notice and knowledge of the same is not brought home to him, the will on the plain words of the statute is not well executed; and this would be so, never mind how distinct or explicit may have been the declaration to the one who was made aware, and took cognizance of it. The proof in a particular case, certainly might give rise to a reasonable legal inference or presumption, that the second witness must have been made cognizant of the declaration to the first, notwithstanding his denial. The proof, indeed, might establish a declaration to the knowledge of both the witnesses, although both denied or failed to recollect it. But this, plainly, would not vary the force or effect to be allowed to this requirement of the statute.

The section then, it is believed, demands that the declaration that the instrument is his will, alike with the subscription or acknowledgment thereof, by the testator, must be made in the presence of both the attesting witnesses, in such a manner as, that they shall both have knowledge of the same. And in the discussions, in the case of the will of Dorothea Brinckerhoff, deceased, heretofore referred to, where however, this particular question was not strictly speaking an issue, to be decided, such was the interpretation put upon this provision of the statute. In *Brinckerhoff v. Remsen*,^(d) Chancellor Walworth says, "no particular form of words is necessary, under this statutory provision, to communicate the information from the testator, to the attesting witnesses, that he knows and understands the nature of the instrument he is executing, and that he intends distinctly to recognize it as his will." And in the same case, on appeal in the Court of Errors,^(e) Chief Justice Nelson uses this language, "I agree that no form of

(d) 8 Paige, 498.

(e) 26 Wend. 325.

words will be necessary; that the legislature only meant, there should be some communication *to the witnesses*, indicating that the testator intended to give effect to the paper as his will." And still more distinctly and emphatically Senator Verplanck, declares his opinion as follows: "When, therefore, it was determined that such a declaration should be made essential to the due proof of wills, as the necessary evidence of the testator's real intent, it was expressly enacted, that this declaration should be made *to each attesting witness*, at the time of execution or acknowledgment. How then, can this positive requirement be satisfied, except by the testator personally making the fact of his own understanding and intention, *known to the witnesses, at the time, by such express words or signs, as could leave no doubt in their minds?* This provision is just as imperative as that requiring two witnesses to the will, though otherwise, a single one might ordinarily be sufficient."^(f)

The cases which have arisen, involving this distinct question, do not, it should be remarked, leave it entirely free from difficulty. In the case of the will of Henrietta Hicks, there were two witnesses, Terry and Rudd. Terry testified that the testatrix acknowledged the instrument to be her handwriting, and her will. "I held the will," said he, "in my hand, and asked her if it was her handwriting, and she said 'yes.' I asked also if it was her will, and she said 'yes.'" The witness Rudd, testified as follows: "The paper was signed by Miss Hicks, the testatrix. She did not say anything that I remember of to me. I did not hear of any declaration by the testatrix, what the instrument was. I do now recollect that I did not hear her say anything as to what it was." Upon this testimony, the surrogate (the late Hon. Charles McVean) determined that the instrument was not sufficiently published as a will, and pronounced his opinion as follows: "The witness Terry, states distinctly, that when he asked the testatrix if it was her will, she answered 'yes.' There is no objection in point of form, as to the declaration that she is thus interrogated, and that she responds in the simple affirmative. It is a good declaration as to Terry, but the form in which it was made, makes it difficult to say, that it extended further than him, or that it was intended to extend further than him. If the issue was, whether the testatrix, then and there made the declaration, that the instrument was her will, the affirmative testimony of Terry would decide it at once that she did. The issue is, did she make the declaration to both witnesses. That she made it to Terry is clear. Had Terry testified that she, addressing both in the presence and hearing of both, had said, 'this is my will,' or had he even testified that he had asked her, whether she declared to him and Rudd that it was her will, and she answered 'yes,' and that Rudd was within hearing distance, and apparently attending to what was said; there would be such a conflict of evidence, as might perhaps authorize a court to say, that he did hear the declaration, notwithstanding that he testifies positively, that he recollects that he did not hear it. There is no evidence here, that it was even intended that he should hear it, or that he was addressed on the subject by any one

(f) See also *Ex parte Beers*, 2 Bradf. Surr. Rep. 164; *Wilson v. Hetterick*, Ib. 431; *Lewis v. Lewis*, 1 Kernan, 220, 225.

in her presence. The evidence of both may stand and the evidence of both has failed to satisfy me, that she made to Rudd, in any manner, the declaration that the instrument was her will. There is no direct affirmative evidence that she did, and he testifies now positively that he did not hear it, and the proof of the fact depending entirely on the sense of hearing, is of the most positive character, that the nature of the case will admit of. The law declares in effect, that the declaration should be made to him, and if it be true that he did not hear it, the declaration was not made to him. It was not "made known" to him, that it was her will, and if it was not made known to him by her, it was not declared by her to him."(g)

The decree of the surrogate in this case, was, however, on appeal, reversed by the circuit judge of the first circuit, and on such reversal, the circuit judge pronounced his opinion upon this part of the case as follows: "The surrogate, understanding from the testimony that the testatrix did, at the time of signing the will, declare to one of the witnesses, that it was her will, supposed that the true issue was, whether she "did make the declaration to both the witnesses." It appears to me that such an issue is not warranted by the statute, but that on the other hand, to allow it would be to add a restriction which the statute has not contemplated, and does not require. The requirement of the statute, (h) in the third paragraph of the section is, that the publication shall be made "at the time of making the subscription, or at the time of acknowledging the same," not that it shall be made "to" any person, but that it shall be made at that time. Chief Justice Nelson, in *Remsen v. Brinckerhoff*, (i) in reasoning upon this provision, infers that as the publication must be at the time of signing or acknowledging, it must, therefore, be made in the presence of the witnesses. The statute would seem to be satisfied, if the publication was made at the time of signing, &c., and the statute and that decision together, would be satisfied if it was done at that time, and in the presence of the witnesses; but neither the statute nor that decision require, not only that it shall be made at that time, and in the presence of the witnesses, but to them and to both of them. Yet the surrogate seems so to understand the rule. He says, "if the issue was, whether the testatrix then and there, made the declaration that the instrument was her will, the affirmative testimony of Terry would decide it at once, that she did." That, as I understand the statute, and the decision of the Court of Errors, was precisely the issue raised, and the only one that could be raised in that regard. The other issue, "whether she made the declaration to both the witnesses," is beyond the statute; yet as I understand the decision of the surrogate, it was because the affirmative of that issue was not made out, that he refused to admit the will to probate. In this I think he erred. He had no authority to impose the additional restriction, that the publication should be made to the witnesses and to both of them. It was enough that it was made at the time of the signing, and in the presence of the witnesses; and I agree

(g) *Will of Dorothea Brinckerhoff*, 26 Wendell, 325.

(h) 2 R. S. 63, sec. 40.

(i) 26 Wend. 332.

with him in the opinion, that the affirmative testimony of Terry establishes the fact that the testatrix did so publish the will."

In *Brown v. De Selding*,^(j) however, the court considered that it was "definitely settled by the court of *dernier resort*, in *Remsen v. Brinckerhoff*, that there must be some communication to the witnesses by the testator, indicating that he intended to give effect to the paper as his will." In that case there were two witnesses, Johnson and Zevely, and in respect to Dr. Johnson, there was, perhaps, some evidence of a publication of the will. At his own instance he procured the attendance of the witness Zevely. When Mr. Zevely came into the room, he was introduced to the testatrix by the doctor. The testatrix inclined her head in recognition, but did not speak. From a difficulty in her breathing, it was apparently hard for her to talk. Soon after or at the time of his introduction, according to Mr. Zevely's testimony, Dr. Johnson, mentioned to the testatrix, that Mr. Zevely was a person whom he had invited to come in and witness her signature to her will. Johnson, in his testimony, stated all the conversation which he remembered, but did not give this remark. He testified that the testatrix "inquired where she must sign the will, and on the place being pointed out, she took the pen and signed." Zevely testified, "she distinctly asked where the proper place was for her to sign." In a subsequent portion of his testimony, he spoke of "her question about where to sign," and in another, of "her asking the question about the place where to sign the will." The will was signed in the presence of Dr. Johnson and Mr. Zevely, and they thereupon signed their names as witnesses, in the presence of the testatrix. No conversation took place between the witness Zevely, and the testatrix, at the time the instrument in question was signed, and none other than what is above specified, occurred between her and Dr. Johnson, nor was there any conversation on the part of any other person, except in reference to other matters.

On this state of facts the court observe: "Now, in this case, nothing whatever was said by the testatrix, except the single question where she must sign. Dr. Johnson says, she asked where she must sign the will; but it is evident he does not intend to give the exact words. Mr. Zevely says she distinctly asked, 'where was the proper place for her to sign.' But the will was not read to her before signing it, nor did she read it, or say anything concerning its contents, nor was any thing said or done by her in the presence and hearing of the witness Zevely, by which she signified to him, that the paper subscribed by her was her last will; she merely signed the paper, and did not even acknowledge her signature, as was done by Mrs. Brinckerhoff. It is true that the witness understood from what passed, that the instrument was a will, and that such was her understanding also; but there was no recognition of it as her will in Zevely's presence, beyond the simple signature, nor in the presence and hearing of Dr. Johnson, unless she used the word 'will' when she asked about the place to sign." And the court, as has already appeared,^(k) concluded as follows: "If we

(j) 4 Sand. Superior Court, Rep. 10.

(k) *Ante*.

should hold the mere signing of a will or any act equivalent to it, without any declaration either before or after signing, in the presence and hearing of each of the witnesses, to be a sufficient publication, we should disregard the plain letter of the statute, which requires that the testator shall, at the time of making the subscription, *declare* the instrument to be his last will. And the court reversed a decree of the surrogate, admitting the will to probate."

In *Van Wyck* against *Seymour*,⁽¹⁾ recently decided in the Court of Appeals, the question was as to the validity of the execution of a codicil to the will of Peter R. Maison, deceased. The case came on upon an appeal from a judgment of the Supreme Court reversing a decree of the surrogate of the county of Westchester, admitting the codicil to probate. There were two witnesses to the alleged codicil, Caleb Roscoe and Caroline See. Roscoe testified that he was sent for by the testator, that he went into the room where the testator was confined to his bed, and that the testator said to him, "I have sent for you and want you to take notice whether you think I am in a rational state of mind, and sufficient mind and memory to make a will, for I have long wanted to make an alteration in my will, and now I have had Jane Ann to write a codicil to my will, and had my wife and every one away and no one to influence me, and I want you now to write to it what is necessary and witness it." The witness then said it would require two witnesses, and Caroline See was sent for. He had the paper in his hand at the time, and the testator told him to date it. He then sat down and wrote at the foot of the codicil, "signed by the testator in presence of the undersigned witnesses, July 29, 1848." When the testator said "date it," his daughter, who was present, said, "I have dated it, pa," to which he said, "no matter, date it again," which the witness said conveyed to him the idea that the attestation should be dated also. Caroline See having come in, and a book having been placed before the testator, the witness turned the paper round on the book to the testator, gave him the pen, and he subscribed it. The two witnesses then also subscribed it. The testator said something to Caroline See, but he did not recollect particularly what he said to her. After the paper had been subscribed and attested, the testator requested the witness to put the codicil up with the will, in an envelope which had contained the will, and seal it up, and to write the executors' names on the envelope. The witness turned the paper over and asked the testator to name the executors, which he did, and the witness wrote them down. He then enclosed the paper in the envelope and sealed it, and the testator requested that it might be opened when all the executors were present. He did not profess to give the terms the testator used, but he said the testator spoke of the paper several times, as being a codicil to his will, both before and after he signed it, but he did not recollect any declaration by the testator from the time the codicil was laid before him for him to sign, until he directed him to write the names of the executors upon it. He did not recollect any distinct declaration of the codicil at the time of

(1) Decided by the Court of Appeals, 23d October, 1851; 2 Selden, 120. The above statement of this case was prepared from the papers used in the Court of Appeals before the publication of 2d Selden.

signing it. He did not recollect that the testator made any declaration about the paper he signed being a codicil, nor that anything was said to him or in his presence by any other person about its being a codicil, after the other witness came into the room on that occasion, and while she was in the room. He did not know whether the other witness was in the room when the testator directed him to write the names of the executors upon the envelope.

Caroline See, the other witness, testified as follows: "The testator signed the will in my presence, and requested me to witness it. The testator said, 'you see I am in my right mind.' I bowed my head. He said, 'speak,' and I said 'yes.' He said, 'I want you to sign your name to that paper.' He was raised up in the bed, called for the paper, pen and ink, and put his name to it. Then Mr. Roscoe signed his name to it; then I put mine; that was the end of it. I left the room. I heard nothing said what was in the paper at that time." She further testified that the paper was folded and a seal called for, that she then left the room, that she left before it was sealed, that she did not hear the paper read, and that it was not read in her presence; that the testator, whilst she was in the room at the time he signed the alleged codicil, did not say, publish or declare that it was his last will or codicil, or anything of that kind, and that he did not on that occasion, in her presence or hearing, speak the word "will" or "codicil." That she knew it was a codicil by seeing the word "codicil" written at the head of the paper. She did not read the paper any further than that she saw "codicil" at the head of it, and noticed the name of one of the executors on it. Those words were coarse writing, and those words struck her eye.

The testator was nearly 77 years of age, and in a very feeble state of health at the time of the alleged execution of the codicil, and there was a question as to the soundness of his mind at the time, and also whether the codicil was not procured by restraint or undue influence.

Foot, Justice, delivered the unanimous opinion of the court as follows:

"The circumstances under which the codicil in question was prepared and executed are unusual and unsatisfactory. The mildest result which can legitimately flow from them, is a close scrutiny of the evidence of its execution, for the purpose of ascertaining whether the requirements of the law have been complied with; as these requirements are guards which the statute has set around the feeble in body and mind, to protect them and the real objects of their bounty from imposition and fraud. The rule is well settled that the fact must be established by some satisfactory proof, that the testator at the time of subscribing his name to the will, or acknowledging his subscription, declared the instrument to be his last will and testament in the presence of each of the two subscribing witnesses.

"In this case there is not satisfactory proof that the testator, at the time he subscribed the codicil in question, declared it to be a codicil to his will in the presence of Caroline See, one of the subscribing witnesses. Judgment affirmed with costs of this appeal to be paid by appellants."

If the witness Roscoe in this case, is to be understood as testifying that the testator used the term codicil or will when he directed the

witness to enclose the codicil in the envelope with the will and seal it up, then the testimony of the witness Caroline See to the effect that seals were called for before she left the room, would seem to leave no doubt that the testator spoke of the paper as a codicil to his will in her presence. This then might be taken as a declaration in her presence, but one which she did not hear or of which she did not take any notice; and if the court so understood the testimony, then this judgment must be regarded as deciding that a declaration of which one of the attesting witnesses does not take cognizance, or knowledge of which is not brought home to him, is not such a publication of the will in the presence of the attesting witnesses as is required by the statute. This question upon the testimony, is not in any way adverted to in the judgment, but the court, it would seem, did not consider the proof as satisfactory, that there was any declaration or publication in the presence of the witness Caroline See. In this view of the testimony, the most that the court were called upon to decide, and all which they do decide, is that the presence of both the witnesses is necessary at the time of the declaration, but the question whether both the witnesses must have actual knowledge of such declaration in order to the due execution of the will, is not directly passed upon, and this question remains to be authoritatively determined. It was regarded as one of some interest, and therefore demanding an examination in these pages. It has heretofore been stated that it is not necessary that the testator should adopt any particular phrase or form of expression in making the declaration required by this provision. The use of the precise term "declare," following the language of the statute, is not absolutely requisite. In *Sequigne v. Sequigne*,^(m) where all the witnesses agreed that at the time of executing the will, and immediately upon finishing his signature, the testator laid down his pen, put his finger on the seal and said, "I acknowledge this to be my last will and testament;" it was held that this was a sufficient publication. "If," said the court, "he had used the words 'I declare this to be my last will and testament,' it would have been a literal compliance with the statute. But can that be necessary? I am not aware of any case, especially on a remedial statute, where it has been exacted. The object of the statute was to secure evidence that a testator, when he executed the instrument, knew that it was a will and not an indenture or deed of a different character. That object has been fully attained in this case, and it is most manifest that the testator knew and intended to make known or communicate to the attesting witnesses, by words and signs, that the paper which he then subscribed was his last will and testament."

The reading of the will in the presence of the testator and the subscribing witnesses, and its subscription by all the parties in the presence of each other, is ordinarily sufficient evidence of a testamentary declaration, and of a request to the witnesses to attest the instrument. The minds of the parties meet on the essential points, through the medium of the reading, and acquiescence or consent to the attestation. No particular form is requisite in these respects, except that the testator shall communicate to the witnesses that it is his will, and he desires them to

(m) 2 Barb. Sup. Ct. Rep. 393.

attest it. This can be done by reading and other acts, performed by a third person, provided an intelligent assent on the part of the testator be shown.⁽ⁿ⁾

It is a publication of the will within the requirement of the statute, if the will be read over to the testator in the presence of the witnesses, and on being asked whether that is his last will and testament, the testator reply in the affirmative.⁽ⁿⁿ⁾ And even where the will is not read over in the presence of the witnesses, if the testator in answer to the question put to him in their presence, whether he declares the instrument to be his will or whether it is his will, says "yes," this it would seem is a sufficient publication.^(o)

So, if a paper commencing with a testamentary declaration, but not having an attestation clause, be read over to the testator in the presence of the witnesses, and he approves of it, and nothing more being said by any of the parties immediately consummates the execution, there is a sufficient publication of the will. Thus, in a case before the surrogate of the county of New York,^(p) where the paper was as above described, and one of the witnesses was sent for by the testatrix to alter a will previously drawn to a later date, and the witness wrote an additional clause, written and dated on the 9th May, 1851, at the dictation of the testatrix, and then, in the presence of the other witness, read the whole paper to the testatrix, and he then signed it for her by her direction, but he did not recollect that she said that the paper of the 9th May, was her last will but she said it was all right, and himself and the other witness then signed as witnesses at the request of the testatrix, it was held that the evidence established a substantial declaration by the decedent of the testamentary character of the instrument at the time of its execution. "Independently of all the other circumstances," said the surrogate, "if there was nothing else than the reading of the whole instrument aloud and the approval of the testatrix, I think that would be a sufficient testamentary declaration."

A statement by one of the witnesses to the other, at the time of the subscription by the testator, and in his presence and hearing, that the instrument is his will, it seems may be considered a compliance with the statute.^(q) But the information in such a case should be distinct and unequivocal. And where the proof was that when one of the witnesses on coming into the room where the testator and the other witness were, inquired what it was they wanted him to sign, the other witness who had drawn the will, replied that it was "the will or agreement" of R. R. the testator, and the testator was silent, it was held that this was too indefinite.

And in all cases the declaration must be distinct and unequivocal. The policy and object of the statute require this, and nothing short of this will prevent the mischief and fraud which were designed to be reached by it.^(r) Thus, where the decedent, at the time of asking the wit-

(n) *Moore v. Moore*, 2 Bradf. Surr. Rep. 261.

(nn) *Doe v. Roe*, 2 Barb. Sup. Ct. Rep. 200.

(o) *In the Matter of proving the will of H. Hicks, deceased*, *Ante*, pp. 90, 91.

(p) *Campbell v. Logan*, 2 Bradf. Surr. Rep. 90.

(q) *Rutherford v. Rutherford*, 1 Denio, 33.

(r) 1 Kernan, 227.

nesses to attest the alleged will, said, "I declare the within to be my free will and deed," it was held that this was not a sufficient declaration of the instrument as his will.^(s) "The declaration," said Mr. Justice Allen, delivering the opinion of the Court of Appeals, "that the instrument was his free will and deed, was equivocal, and would be satisfied by a deed executed voluntarily. It did not necessarily inform the witnesses that it was a will by excluding every other instrument from the mind. From the expression they could not know that the testator did not suppose the instrument was a deed. It is a very common form of acknowledgment of the execution of a deed, to acknowledge it as the "free act and deed" of the party, and the expression of the decedent varied but little from this form."

Where the decedent at the time of signing the alleged will, said to the witnesses he had "an instrument in writing," he wanted them to witness, and no other statement or declaration was made; although the whole instrument was in the handwriting of the decedent, and although the witnesses understood from the circumstances and from looking at the paper, and one of them from reading a part if not the whole of the attestation clause, that the instrument was a will, yet it was held that the instrument was not published by the decedent as his will as required by the statute, and sentence was pronounced rejecting the will.^(t)

Again, so material a part of the important affair of executing a will as the declaration, cannot be left to the interpretation of a laugh, to mere guess, surmise or conjecture. Where both the witnesses concurred in the statement that the decedent simply acknowledged his signature, and, pointing with his pen to the attestation clause, requested them to sign as witnesses, and state their residence under their signatures: and they affirmatively disproved any testamentary declaration, but from extraneous circumstances they guessed it was a will, and one of them expressed his opinion in this way: "It is a poor look for me, as a witness to the will does not receive anything" and the decedent laughed, but still neither assented nor dissented, and that was the whole transaction, it was held that there was not a sufficient testamentary declaration, and that the instrument was not properly executed as a will.^(u)

The fourth and only remaining subdivision of the statute, provides that there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator.

Although there are the names of more than two witnesses signed to the will, it is enough if only two know or take cognizance of the solemnities required for the execution, or are called upon to attest their performance. The statute does not demand more than two attesting witnesses, and though a third person sign his name as a witness, it will not invalidate the execution, if there be an omission of the observance of any formality in respect to him.^(v)

(s) *Lewis against Lewis*, 1 Kernan, 222.

(t) *Wilson v. Hetterick*, 2 Bradf. Surr. Rep. 427.

(u) *Ex parte Beers*, 2 Bradf. Surr. Rep. 163.

(v) See *Lyon v. Smith*, 11 Barb. Sup. Ct. Rep. 124.

The English Statute of Wills, (1 Vict. ch. 26, sec. 9,) provides that the "witnesses shall attest and shall subscribe the will," and it is held in the Ecclesiastical Court, that the *initials* of the attesting witnesses to a testamentary paper, are a sufficient subscription under the act; they are not required to sign their names.^(w) The statute of this state, it is plain, cannot be satisfied by the witnesses signing anything less than their names. As has already been made manifest, a much greater degree of precision and formality are required in the execution of a will under the present law of this state, than under the Statute of Frauds, or the previous statute of this state or the present English statute.^(x)

(w) *In the Goods of Christian*, 2 Robert. 110. See, also, *In the Goods of Cope*, Ib. 235.

(x) If this view of the statute be correct, it is not competent for the subscribing witnesses to make their marks as witnesses, or for another person to write their names for them. The statute, as has been seen, (*Ante*, pp. 59, 62,) has an express provision, which, by implication, allows the name of the testator to be signed by another person by his direction; but, with respect to the witnesses, the only provision in this particular is that each "*shall sign his name as a witness*." Under the Statute of Frauds and the present English statute, and perhaps under the former statute of this state, in the case of the witnesses as well as of the testator, a subscription by mark was and is sufficient.*]

But those several statutes required, and the present English statute now requires, the witnesses only to *attest and subscribe* the will. A signing by mark by the witnesses can hardly be said to satisfy a statute which expressly requires the witnesses to *sign their names*. So far then as the language used by the legislature affords an indication of the meaning of this provision, an individual who cannot write is precluded from becoming a witness to a will. Upon the same principle upon which it has been determined that it is not necessary for the witnesses to sign in the presence of the testator, because the provision to this effect in the former law is omitted in the present statute, (see *Riddon v. McDonald*, 1 Bradf. Surr. Rep. 352; *Lyon v. Smith*, 11 Barb. Sup. Ct. Rep. 124,) the change in the phraseology respecting the attestation by the witnesses, must be regarded as expressly demanding witnesses who can and do write their names in order to the due attestation of the instrument as a will.

The legislature, when they provided in the 41st section that every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will, seem to have taken it for granted that the provision requiring the testator to subscribe the will at its end, authorized a subscription by the instrumentality of another person.[†]

And it may be said that they regarded "subscribe" in the first subdivision of the 4th section, and "sign the testator's name" in the 41st section, as equivalent expressions. It would follow from this that the only mode of subscription by the testator authorized by the statute, is his name either written by himself or by another person by his direction. And when, at a previous page, (*Ante*, p. 62) it was stated that a subscription by mark by the testator was sufficient, it was also stated not that the mark alone would satisfy the statute, but that the mark was to be inserted between the given and the surname, or otherwise in connection with the name of the testator written there by another person by his direction; which would be a writing of the name of the testator precisely in conformity with the words of the 41st section. But this

[*] *Baker v. Deming*, 8 A. & E. 94; *Jackson v. Van Dusen*, 5 Johns 144; *In the Goods of Ashmore*, 3 Curt. 756; *In the Goods of Ames*, 2 Robert 116. In *Jackson v. Van Dusen* the attestation to the will by the witness in respect to which a question was made, although spoken of as by mark, was by his initials, "S. W." The action was ejectment, in which it became necessary to prove the will. Two of the attesting witnesses had signed their names, and the third had signed his initials as his mark. After proof of the two signatures, a witness testified that he had seen Samuel Wheeler, the other attesting witness, on a previous occasion, affix the same letters in a similar manner to another paper than in his possession, and that he subscribed his name as a witness to such signature. And that from a comparison of the mark affixed to the will, with the mark so made by Wheeler to the former paper, he believed that Wheeler made the mark to the will; that there was a small difference between the "S. W." in the two marks, and that he judged only from the comparison of the two and from the manner the S was made, it being inverted (S). It was this identification of the initials of the witness which enabled the party to prove the will. If the witness had made his mark merely, the proof of the formal execution of the will would have been out of the question. This difficulty in the way of proving a will where an attesting witness has signed otherwise than in his own handwriting, and he is dead or without the jurisdiction, is alluded to hereafter in connection with the present subject, and there is great reason for believing that it was with a view of preventing its occurrence in future, that the legislature enacted the provision requiring the attesting witnesses to *sign their names*.

It may be added, that it does not appear, from any reported case, that the English decisions on the Statute of Frauds, allowing the sufficiency of a mark by an attesting witness to a will, were ever adopted in this state, as applicable to the Statute of Wills previous to the Revised Statutes.

[†] This provision was originally recommended by the revisers to be adopted in connection with a provision expressly authorizing the testator's name to be signed by another person. 2 R. & O. S. (2d. ed.) app. 627, 628. See this point particularly adverted to, *post*, p. 99.

Where, however, the attestation was made by one witness signing his own name, and holding and guiding the hand of a second witness while the name of the latter was signed, it was held that the execution was valid.^(y) And in *Mechan v. Rourke*,^(z) where a subscribing wit-

(y) *Campbell v. Logan*, 2 Bradf. Surr. Rep. 90.

(z) 2 Bradf. Surr. Rep. 386.

would not at all vary the force of the directions used with reference to the witnesses that they should *sign their names*. So that although the terms "subscribe" and "sign the testator's name" are used by the legislature as synonymous, there is still no alternative for the witnesses but to write their names themselves, as there is not any provision authorizing their names to be written by any other person. It is further apparent that the 41st section in the case of the person who signs the testator's name to the will by his direction, requires a person who can and does write, for, besides speaking of such signing, it expressly directs that he "shall write his own name as a witness to the will." And it is not to be presumed that the legislature intended that the qualifications of the witnesses in this respect, should be otherwise than uniform in all cases. And, indeed, the whole of the 41st section distinctly contemplates witnesses who are able to write, for it imposes a penalty upon the witnesses in case they do not "write opposite to their names their respective places of residence" and if the person signing the will for the testator do not also write his own name as a witness to the will, which clearly is ineffectual and inoperative if witnesses are allowable who cannot write at all. It is hardly to be supposed that it was the intention of the legislature to allow a person not able to write to become an attesting witness to a will, and then to impose upon him a penalty of fifty dollars for not writing opposite to his name his place of residence. Yet this they have done, if the statute is to be construed as admitting such persons to become attesting witnesses to wills.

It is true that the 41st section itself provides that the omission by the witnesses to comply with its requirements shall not affect the validity of the will. But the intentions of the legislature with respect to the qualifications and duties of the attesting witnesses, are not the less plainly indicated by its terms on this account. This clause, it is submitted, merely saves the will in case of the non-performance by the witnesses of the particular writing required by this section, but it does not dispense with their writing at all, nor can it fairly be construed to vary in any way the meaning or force of the requirement of the 4th subdivision of the preceding 40th section, that each of the attesting witnesses shall sign his name as a witness. Besides, the section goes on to provide for compelling the witnesses to testify, notwithstanding they may have laid themselves liable to the penalty it imposes. Now a person not able to write could not, in the nature of things, be liable to this penalty. This provision, then, on the supposition that witnesses are admissible who cannot or do not write, would not have any application and would be absurd, which demonstrates conclusively that the clause saving the will in case of the non-compliance by the witnesses with the provisions of this section, does not admit of witnesses who do not write at all.

The history of the circumstances attending the adoption by the legislature of these provisions of the statute, furnishes additional evidence in support of the natural and obvious interpretations of the language of the statute itself. The revisers, in their report to the legislature of a provision prescribing the formalities for the execution of wills of real estate, although they recommended the re-enactment substantially of the second section of the former act concerning wills, (1 R. L. 1813, 364,) the section which they proposed differed from the former section in this particular, very material to the present inquiry, that instead of requiring merely that the will should be attested and subscribed by the witnesses, it distinctly prescribed that the witnesses should "subscribe their names as witnesses."^[*]

This was followed in their report by the present 41st section, in precisely the language afterwards adopted by the legislature.^[†]

With these propositions before them, distinctly recommending that the law respecting the mode of attesting wills, which before that time, it may be assumed, had allowed attesting witnesses to sign by mark or by the agency of another person, should be changed, the legis-

[*] 3 R. & or. S. (2d ed.) app. p. 627. See also the proposition of the revisers relative to wills of personal estate in certain cases, p. 629, sec. 38.

[†] The reason given by the revisers for this section is, that it will facilitate the proof of wills and the detection of forgeries. Affixing the residences of the witnesses to their names is certainly calculated for both these purposes, but what can be more easy than to counterfeit a mark, or to set up a name written by the agency of another person. To require the witnesses themselves to write, is calculated most effectually both to facilitate the proof and to prevent forgeries.

ness made her mark opposite her name, written by the other witness, and she "acknowledged it to be her mark and signature," it was held that the mode of attestation was a sufficient compliance with the statute requiring the witness to "*sign* his name." "A witness," it was said,

lature deliberately adopted the phraseology found in the present 40th and 41st sections. They prescribed that the witnesses should *sign their names* as witnesses, and they enacted the further section proposed by the revisers, by which witnesses who can and do write are very explicitly demanded. It is submitted that this view of the proceedings of the legislature in enacting these provisions, leaves little room for doubt that they intended to require that the attestation of wills should be in the proper handwriting of the attesting witnesses, and not by mark nor by the agency or guidance of other persons.

It is worthy of notice, in this connection, that the revisers manifestly intended to recognize and sanction a different mode of signing or subscription by the testator, from that prescribed for the attestation by the witnesses. For they recommended in respect to the testator, the old provision that the will should be signed by him "or by some other person for him, and in his presence and by his express direction;" whilst as to the witnesses they required simply but imperatively that they should "subscribe their names." And the provision of the 41st section, requiring the person who signs the testator's name to any will by his direction to write his own name as a witness to the will, was founded upon and was literally consistent with this provision expressly authorizing the testator's name to be signed by another person, whilst strictly it has no application to the provisions of the 40th section, as adopted by the legislature. The legislature seemingly overlooked this discrepancy, but, however, the provisions adopted may admit the construction that the testator may subscribe the will by the agency of another person, their language in respect to the witnesses preserves all the strictness proposed by the revisers, and they adopted all the recommendations of the revisers as to the duties and qualifications of the attesting witnesses, and in express terms required that they should sign and write their names and places of residence.

The policy or reason of the statute upon this point is not properly a subject for discussion, in view of the plain import of the language used. But there is good ground for supposing that the legislature, in consideration of the new formalities for the execution and attestation of wills introduced by the Revised Statutes, whose observance the subscribing witnesses were to be called upon to attest and authenticate, purposely determined to require as a qualification of those witnesses that they should be able to write. The former statute, under which illiterate persons unable to write were admitted as competent attesting witnesses to a will, did not contain any requirement of publication, or request to the witnesses, in order to the valid execution and attestation of the instrument as a will. When those requisites were prescribed, a degree of culture in the witnesses, enabling them at least to write their names, was properly demanded. [*]

It is manifest, also, that the signatures of the witnesses written by themselves, furnish a reliable foundation for those legal presumptions in favor of the due execution of a will, which arise upon proof of the handwriting of the witnesses when they are dead, or without the jurisdiction at the time of the proof, and that any other mode of attestation is defective in this particular. And this, also, may have been an object in the judgment of the legislature calling for the provisions of the new statute requiring attesting witnesses who can write.

The construction of the statute thus contended for, is certainly liable to the objection that it precludes the making of a will, in an emergency where the attendance of two witnesses able to write cannot be procured. The art of writing is now so generally acquired, that such cases can but seldom occur. Those disabled from writing by disease or infirmity are not frequently called upon to attest wills. A person otherwise capable of being a witness to a will, will usually be found able to write. Where this is not so, however, the general rule prescribed by the legislature for the prevention of frauds, and to ensure the most reliable evidence of the due execution of the will, must prevail over what may appear to be the right of the particular case. There may be cases in which the observance of other requirements of the statute may be impracticable, and the rejecting the will in the case under consideration, would be attended with no greater hardship than in these.

After the foregoing observations upon the mode of attestation to be required of the subscribing witnesses to a will had been prepared, the writer became acquainted with the two above quoted decisions upon the subject, contained in the second volume of the reports of Mr. Surrogate Bradford. Without for a moment supposing that any new light is thrown upon the question by the investigations of the writer, as the comparison of the provisions of the present with those of the previous statute, and also of the several provisions of the 40th and

[*] Such a change in the law, it has been seen, was recommended by the revisers even without the new formalities.

"who has written the testator's name, must *write* his own. He has shown he can write. Other witnesses may '*sign* their names,' where another person writes the name of the witness, and then the witness acknowledges the signature—puts his mark to it, his *signum*—he literally

41st sections of the statute with each other, and the history of the legislation upon the subject above given, had been omitted by the learned surrogate in the judgments referred to, it was deemed advisable not to suppress the matter thus prepared, and it is, therefore, offered for the consideration of the reader.

With respect to the decisions mentioned, some remarks may also with all deference be submitted.

In *Campbell v. Logan*, the first of these cases, it appeared in proof, that the name of the testatrix was subscribed to the will by William Crooker, one of the witnesses, he guiding her hand, and she holding the pen. The same thing occurred as to the subscription of the name of the other witness, Sarah M. Disoff, who took hold of the pen, while Crooker conducted it and wrote her name. The surrogate, in pronouncing his judgment, makes the following examination of the English cases: "*In the Goods of John White*, (2 Notes of Cases, 461,) Sir H. Jenner Fust held the execution of the will insufficient, where it appeared that one of the witnesses signed not only his own name, but that of the other witness, his wife, who was present at the time. The judge put the decision on the ground that the statute did not authorize any person to subscribe the witnesses' name. That the act required both witnesses to subscribe "either by signature or mark." There was no evidence that the wife had in fact become a party to the subscription of her name as a witness, in which respect that case differed from the following: In *Harrison v. Elvin*, (3 Qu. B. R. 117,) a will made after the statute of 1 Vict. ch. 26, was attested by one witness in his own handwriting, and he also held and guided the hand of a second witness, and in this way the name of the second witness was written. This was held a good attestation, the second witness being really a party to the act of signing his name." And after referring to the manner of subscription by the testator required by the statute, the learned surrogate proceeds to the consideration of the present question as follows: "There is nothing in the statute authorizing one witness to sign the name of another witness. The question is therefore brought down to the same point presented in *Harrison v. Elvin*, that is, whether by holding the pen, while the other witness guided it, the former so became a party to the act of signing, that it may properly be termed his signature, though he was aided by another in making it. Our statute differs from the English act, in requiring each of the witnesses "*to sign his name* as a witness at the end of the will," while the latter only prescribes that the witnesses shall "*attest*" and "*subscribe*" the will. The will by our act is simply required to be "*subscribed*" by the testator, but each of the witnesses must "*sign his name*." For the witness merely to put his mark, is not a signature of his name, and where witnesses attest by mark, their names are generally written by other persons, without the marksman taking any part in the act. In such cases a question may very well arise whether that mode of execution [attestation?] is sufficient; but in the present instance the facts show a physical participation of the witness in the act of signing her name, which I think it reasonable to hold a sufficient compliance with the statutory requirement."

This decision can hardly be said to have left this question free from difficulty. Although the learned surrogate expressly points out the difference, in the language between the English act and the provisions of the Revised Statutes, he nevertheless, adopts a decision made under the English act, as the foundation for his judgment in the case before him. And without advertent at all to the express language of the 41st section relative to the duties of the witnesses, in connection with that of the fourth subdivision of the 40th section, he intimates that a signing by the attesting witnesses by mark alone would not be sufficient, but the cases which he quotes conclusively show that a mark is as good as a signature, and certainly as good as a mere participation in the act of signing. Indeed it seems to have been granted on the argument of *Harrison v. Elvin*, (3 Qu. B. R. 118,) that a mark by a witness was a good mode of attestation, but it was urged that a signing by guidance had not the virtues of a mark. What shall amount to a physical participation by the attesting witness in the act of signing, is left by the learned surrogate entirely undetermined. It would be, strictly speaking, a participation in the act of signing, if the witness not able to write should hold the pen whilst another person guided his hand in the making of a single letter of his name, or even in the making of a line composing a part of one of those letters. And this would be a mere signing by mark, and bring the attestation of wills under this statute, expressly requiring the witnesses to sign their names, back to the same thing; it was under a statute which simply required that they should attest and subscribe the will.

"It is not to be deemed," says Mr. Justice Bronson, discussing a question on the statute

signs; and what he signs is his name—i. e., he signs his name—while a mark alone would not be sufficient.”

It has already appeared (a) that where the will consisted of eight sheets or pieces of paper, securely bound together at the ends in the usual form of law papers, and the writing of the will commenced the first and was continued on the four succeeding sheets, where it was brought to a close by the usual attestation clause, and was subscribed by the testator and the witnesses, and, on one of the sheets following the subscription, was a map referred to in the body of the will, and which was not signed by the testator or the witnesses, it was held that the signing by the witnesses, as well as the subscription by the testator to the will, was in strict compliance with the statute.

The statute directs that the will shall be subscribed by the testator “at the end,” and that each of the witnesses shall sign his name “at the end of the will.” The same place is here spoken of—the end—and the testator and the witnesses must all unite in authenticating the instrument at its point of completion. “The object of the law,” says the surrogate, in the case of the will of Catharine Kerr, deceased, (qa)

relative to contracts for the sale of goods, (2 R. S. 136. See *Downs v. Ross*, 23 Wend. 270, 272.) “that a pretty large license was formerly taken in the construction of statutes. Refined and artificial distinctions were sometimes sanctioned for the purpose of taking cases out of the operation of legislative enactments, and a broad foundation was thus laid for the vast amount of legal controversy which has followed.” The distinction taken in the English cases quoted by the learned surrogate, between a signing by one witness to a will of the names of both, and a signing by one in which he only participates by holding the pen, may be warranted by the provisions of their act, and the decisions on the similar provision of the Statute of Frauds, but it is not perceived that under the Revised Statutes, it can properly have any application here.

In *Meehan v. Rourke*, the other case referred to, the learned surrogate puts the decision mainly upon the distinction supposed to be made by the statute between a witness *writing* his name, when he has subscribed the testator's name, and being required in all other cases, only to *sign* his name, which latter the surrogate argues means only that he shall put his mark to his name, his *signum*. It has been proposed above, to show that the legislature in these different provisions, used the words “subscribe,” “sign” and “write” his name as equivalent terms, all requiring that the party referred to should write, the case of the testator's signature by another person pursuant to the 41st section alone excepted. It may be here added, that in the very section upon which the supposed distinction alleged by the surrogate is based, the words “sign” and “write” are used as synonymous in respect to the affixing of the names of the testator and the witnesses to the will. The expression is “and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will.” It can hardly be contended that the statute means that a person signing the testator's name to a will by his direction, may put a mark sign, (*signum*) to the will for the testator. It clearly contemplates that the name of the testator shall be written to the will. Yet if the words “sign the testator's name,” in this place require that the person shall write the name, it is difficult to conceive of any reason why the words “sign his name” used in the previous part of the statute, should not equally require the witness to write his name.

The learned surrogate, in the course of his examination of this question in this case, makes the following remark, above quoted in the text: “A witness who has written the testator's name, must write his own. He has shown he can write.” By the letter of the statute, the witness who *must* write his own name is the one who has *signed* not *written* the testator's name; but without dwelling upon this inadvertance, it may be suggested that it is not easy to perceive the precise meaning or application of this remark. It is of no consequence, certainly in the view taken of the statute by the learned surrogate, that the witness “*can write*.” Although he can write, he is not required, except where he signs the testator's name by his direction, to write his name as a witness to the will. His mark sign (*signum*) to his name is all which is requisite.

(a) *Ante*, pp. 63, 65, referring to *Tonnel v. Hall*, 4 Comst. 148.

(aa) *McGuire v. Kerr*, 2 Bradf. Surr. Rep. 244.

"has been not only to exclude a signature at any other point, but also to have the concurrence of all the parties as to the end of the will, and to secure the instrument from interpolation or unauthorized addition. It is not to be regarded as a mere arbitrary will; the provision is a judicious one, and care should be taken not to break in upon it by lax interpretation."

The circumstances of the case of the last will and testament of Catharine Kerr, deceased, before the surrogate of the county of New York, and the form of subscription and attestation there occurring, have appeared in a previous page,^(b) in connection with the consideration of the provision of the statute requiring the testator to subscribe at the end of the will. In pronouncing his judgment upon that case, the learned surrogate declares the execution and attestation defective, and expounds the meaning and application of the several provisions of the statute relating to the question, in the following lucid and cogent language: "In the present case," says the surrogate, "if the first signature of the name of Catharine Kerr is at the end of the will, there is no attestation of the witnesses at that place. After that comes the appointment of executors, and this is attested by the witnesses but not subscribed by Mrs. Kerr: and then comes another clause, purporting to be signed by Mrs. Kerr, but which is not attested by the witnesses. The decedent and the witnesses, supposing Mrs. Kerr's signature to be genuine, do not agree upon any one point as the end of the will. The last clause is not attested, and it must be excluded from probate. The clause next to the last is not signed by the testatrix, and must be excluded likewise, and then all that precedes the first signature of the testatrix is not attested at its end, so that the entire instrument must be rejected. I think that the testator and witnesses must agree as to the instrument—what it is, and where its end is. But for the testator to affirm by his signature that one part is the will, and the witnesses to affirm by their signatures that another clause is to be added, is such a disagreement as defeats the requirement of the statute that the will must be signed by all parties at the end. The act of authentication must take place at the termination of the testamentary disposition, and the testator and the witnesses must concur in determining that point. The law is no more fulfilled by the testator signing in the middle of the will and the witnesses attesting at the end, than by the witnesses signing in the middle and the testator at the end. They must all subscribe at the end."

In the case of *The Goods of M. Taylor*,^(c) paper A., beginning with the words, "This is the last will and testament," &c., and ending with the words, "Revoking all former wills by me made, I do declare this my last will and testament," and having a full attestation clause as for a will, was written on the first and second sides of a sheet of paper. Paper B., beginning with the words "I do make this as a codicil to my will," and ending with the same words of revocation and a similar attestation clause as A., was written on the third side of the same sheet of paper. The deceased signed A. and B. on the same occasion, in the

(b) *Ante*, pp. 64, 65.

(c) 15 Jur. 1090; 9 Eng. L. & Eq. 582.

presence of two witnesses, who subscribed A only. Neither paper was dated. There was nothing in the disposition of the property to make the two inconsistent. On a motion for probate of A and B as together containing the will, Sir H. Jenner Fust said, "I cannot, on motion, certainly, decree probate of B, which has not the names of any subscribing witnesses. The fact of its being written on the same sheet of paper as A, does not alter that fact. Decree probate of A only."(d)

The practice almost uniformly obtains for the attesting witnesses to sign their names at the close of an attestation clause following the will, and certifying to the observance by the testator and the witnesses, of the formalities requisite to the due execution of the instrument as a will. An interval thereby occurs strictly considered between the end of the will and the signatures of the witnesses. This practice arose under the 5th section of the Statute of Frauds, and the previous statute of this state relating to wills of real estate, which it will be remembered required that the will should be attested and subscribed in the presence of the testator by three or more creditable witnesses. This certificate was deemed requisite among other things, in order to show the purpose for which the names of the witnesses came upon the paper, and the character in which they signed; and as the statute distinctly required that the witnesses should attest as well as subscribe the will, this was, perhaps, considered as demanding some written recital, from which the observance of the prescribed formalities could be gathered or presumed. The present statute, although it speaks of the witnesses as attesting witnesses, does not enact that they shall, in the discharge of their functions, do anything more than sign their names as witnesses. The term attesting, used as a description of the witnesses, does not of itself imply any thing more than this. Even in the construction of the former statute, the thing required was (as according to all sense and reason it ought to have been) that the forms thereby prescribed should be proved to have been complied with, but that the simple attestation by the word "witness" was sufficient.(e)

The attestation clause does not constitute a part of the will, and under the present statute is not necessary to its validity, as the witness will be permitted to prove that the forms prescribed by the statute were in fact all complied with, although the attestation clause is silent on the subject.(f) Upon a rigid construction of the present statute

(d) It should be noted that the English statute (1 Vict. ch. 26, sec. 9) under which that decision was made, only requires that the witness "shall attest and shall subscribe the will in the presence of the testator."

(e) *Burdett v. Doe d. Spilsbury*, 7 Scott's New Rep. 66, 111; per Williams, J.

(f) *Chaffee v. Baptist Missy. Conv.* 10 Paige, 85, 89; per Walworth, Chan. See also *Bryan v. White*, 14 Jur. 919; 5 Eng. L. & Eq. Rep. 579. In the judgment of the court in the case of *Grant v. Grant*, (1 Sandf. Ch. Rep. 235,) much stress is laid upon the absence of proof, of an attestation clause, to the will there in question, which was alleged to have been lost or destroyed; and the general remarks of the Assistant Vice-Chancellor, (the late learned and lamented Hon. Lewis H. Sanford,) would seem to imply, that according to his understanding of the law, an attestation clause, or something equivalent to it, was essential to the validity of the execution of the will in all cases. It should be observed that the authorities referred to in that judgment were all cases arising on wills executed by married women under powers. It was regarded as settled by *Wright v. Wakeford*, (4 Taunt. 213,) and several subsequent cases, that the attestation of an instrument, executed in pursuance of a power, should set forth a compliance with the terms of the power, and that although the

then, the conclusion of that clause at an interval from the end of the will, is not the place designated for the attesting witnesses to sign.

One object which the legislature had in view in requiring the subscription by the testator to be made at the end of the will was, that the

proof fully establish such compliance, yet the want of a recital thereof, in the attestation of the witnesses, was fatal to the validity of the execution. This doctrine extended, of course, to wills executed by married women under powers, and although under the Statute of Frauds, no form of attestation, further than the mere word, "witnesses," was necessary, yet in the case of a power, even if the things required by it were in the very words and letters of the Statute of Frauds, (viz., attested and subscribed in the presence of the devisor, by three or four credible witnesses,) a will which would have been clearly good under that statute, must have been held invalid without, as Mr. Justice Williams expressed it, "the addition of an idle formula." (See *Doe ex dem. Burdett v. Spilbury*, 7 Scott's New Rep. 66, 111.) But no such rule was ever applied to ordinary wills. The only cases where the attestation was ever brought in question in respect to such wills were, where the proof of the will depended entirely upon the legal presumptions, arising upon the face of the instrument itself, on evidence of the handwriting of the witnesses, and even in those cases, it was decided that the formality of signing, not noticed in the attestation clause, might be presumed from circumstances, after the witnesses to the will were dead; (*Croft v. Paulet*, 2 Str. Rep. 1109; *Bryce v. Smith*, Willes' 1; *Hands v. James*, Comyn's Rep. 531; *Price v. Brown*, 1 Bradf. Surr. Repts. 291, where all the cases are collected,) and that, although the fact of the subscription of the witnesses in the presence of the testator was omitted in the attestation, yet, if the witnesses were dead, and their hands proved in common form, it was evidence to be left to a jury, of a compliance with all the circumstances; and this, although it was contended that the hands of the witnesses, could only stand to the facts they had subscribed to: and verdicts were given in favor of the wills; and, indeed, it seems clear, that in every case of this nature, free from any particular suspicion, a jury would find the solemnities adhered to. (Sugden on Powers, 317.) An attestation clause, is not probably required, under the Revised Statutes, any more than under the previous statute. Indeed, the language of the section expressly defining the duty of each of the attesting witnesses to be, to sign his name as a witness at the end of the will, negatives the idea of any further requisite, and leaves the statute to be understood, the same as though it contained the provision of the English Statute of Wills, (1 Vict. ch. 26, sec. 9,) that "no form of attestation shall be necessary."

The following remarks of Chancellor Walworth, in *Chaffee v. The Baptist Missionary Convention*, (10 Paige, 85, 90,) are so directly to the present purpose, and contain suggestions so wise and admirable relative to the duties of the attesting witnesses, and the proper course to be pursued on the execution of a will, as to warrant their insertion at length in this place. "The statute," says the Chancellor, "does not require an attestation clause, showing that the proper legal formalities were complied with; and although upon the face of the instrument, those formalities are stated to have taken place, the fact may be disproved by the witnesses. But prudence requires, that a proper attestation clause should be drawn, showing that all the statute formalities were complied with; not only as presumptive evidence of the fact in case of the death of the witnesses, or where from lapse of time, they cannot recollect what did take place, but also for the purpose of showing that the person who prepared the will, knew what the requisite formalities were, and, therefore, gave the proper information to the testator, or saw that they were complied with, if he was present. To impress the more strongly upon the memory of the witnesses, the important fact that all the legal forms, requisite to a due execution of the will were complied with, at the time when they subscribed their names as witnesses to such execution, the safer course always is to read over the whole of the attestation clause, in the presence and hearing of the witnesses, and of the testator. And where the person executing the will, is not known to the subscribing witnesses, to be capable of reading and writing, especially if he executes the will as a marksman, it would be proper that the whole will should be deliberately read over to him, in the presence and hearing of the witnesses, and the fact of such reading in his presence, should be stated in the attestation clause. Or at least the witnesses ought, by inquiries of the illiterate testator himself, to ascertain the fact, that he was fully apprized of the contents of the instrument which he executed and published as his will, as well as that he was of competent understanding to make a testamentary disposition of his property. All these things, however, are matters of precaution and prudence, to prevent any well founded doubt upon matters of fact, and where they are neglected, it does not necessarily render the will invalid, if the court or jury which is to pass upon the question of its validity, is satisfied, upon the whole evidence, that the will was duly executed, and that the testator understood its contents."

testator should denote clearly that he adopted the instrument after it was finished and perfected, and completed it as his will by actually signing the same at its close; and another, it may be conjectured, was to prevent additions to wills, made even by the testator himself, after execution. The present provision requiring the witnesses also to sign their names at the end of the will, is eminently calculated to serve the same purposes, and it may be presumed was framed with a view to the same objects. The space then which may be permitted to intervene between the actual end of the will and the signatures of the witnesses, is to be determined by the same rules which apply to the provision relative to the subscription at the end of the will by the testator. The allowance of a space after the close of the will and preceding the signatures of the witnesses, sufficient for the insertion of a memorandum, in the shape of an attestation clause, not essential to the validity of the instrument as a will, has been sanctioned by unquestioned practice, and may probably now be definitely considered as authorized by law.^(g)

The requirement of the statute is plain and easily to be complied with. Immediately after the last line of the will the witnesses should sign their names. In order to prevent any question, in case of the death, absence from jurisdiction, or failure of memory of the witnesses, whether this alone would furnish presumptive evidence of a compliance with the directions of the statute? An attestation clause may be annexed, and also signed by the witnesses, certifying to an observance of the prescribed formalities. Or the statute will be strictly satisfied, and the necessary legal presumptions in favor of the due execution of the instrument as a will will be provided for, if the will itself set out that it was subscribed, and published and witnessed in accordance with the directions of this section, and then the witnesses simply sign their names in the character of witnesses.

Each of the attesting witnesses is to sign his name as a witness at the end of the will, *at the request of the testator*. It is not material at what particular stage of the execution the request to the witnesses is made. The statute, though it does, as to publication, contain a provision as to the time at which that shall be made, viz., the time of subscription, does not contain any as to the time when the witnesses are to be requested; and the testator is not in that regard bound down by any express enactment. The attesting witnesses are regarded in the law, as persons placed around the testator in order that no fraud may be practiced upon him in the execution of his will, and to judge of his capacity.^(h) This statute, by a provision not commonly found in statutes on wills, has conferred upon the testator, alone, the power of selecting the persons who are thus to be placed around him. And when it is ascertained that the attesting witnesses, his protectors against fraud, and the judges of his capacity, have been freely chosen by himself, and not imposed upon him by others, the whole purpose of the law is answered, and its requirements are literally as well as substantially complied with.

(g) In a recent case before Sir H. Jenner Fust, where the only signing by the testatrix was with the attesting witnesses at the end of the attestation clause, it was held that the will was signed at the foot or end thereof by the testatrix. *In the Goods of Whittle*, 2 Robert 122. See also *In the Goods of Anderson*, 15 Jur. 92; 1 Eng. L. & Eq. Rep. 634.

(h) 2 Greenl. Ev. sec. 691.

Thus, in *Sequine v. Sequine*,⁽ⁱ⁾ where one of the attesting witnesses who had prepared the will by direction of the testator, testified, that after the testator had examined it he said it was right, and told him that he had selected him and the other two witnesses (naming them) to be witnesses to his will, and then sent his servant for those other two to come to his house; that they came in together, and the testator then told one of them that he had sent for them to be witnesses to his will; and that he then signed it in their presence, and declared it to be his will, and then the witnesses signed it in his presence, and immediately left the room; and further, that he did not then know that it was necessary, under the statute, for the testator to request the witnesses to sign as such: and another of the witnesses testified that when he entered the room the testator said to him, "Sheriff, I have sent for you as one of the witnesses to my will;" and that after the testator had signed it, "he shoved the paper or handed it over to the witness to witness or sign it:" and the third witness testified that when he entered the room, the testator told him he wanted him to be a witness to his will: but all the witnesses testified that nothing was said to them after that about their being witnesses to the will; it was held that the request to the witnesses was sufficient. "In this case," said the court, "there is no doubt that the testator enjoyed and exercised this freedom of choice, [of the attesting witnesses,] and exercised it in such a manner that his request to the witnesses was as much a part of the *res gestæ* as any other ingredient in the execution of the will. His subscription to the will, his publication of it, his request to the witnesses, and their subscriptions, were all done at the same time; not at the same instant of time, for that would have been impracticable; but at the same interview, one act immediately following the other without any interval, and without any interruption to the continuous chain of the transaction. This was enough. It was a strict compliance with the requirements of the statute."

It is not necessary that the testator should in terms request the witnesses to attest the execution. The request may be implied as well as expressed. If they are sent for by his attendants, in his presence, and without objection; if upon their introduction he sets himself to the execution of the will, and delivers it, when subscribed, to the witnesses, in order that they may sign it, and they do sign it in his presence, he thereby adopts the acts of his friends, and makes their request his request, within the spirit and meaning of the statute. This was so held in *Doe v. Roe*.^(j) It was stated in that case, to the witnesses, in the testator's presence, that they had been sent for for the purpose of being witnesses to the will, and they subscribed their names as witnesses, after the will with the attesting clause had been read to the testator, and signed by him in their presence, and it was held that there was sufficient evidence to be submitted to a jury, upon the question whether there was a request or not. The same point was decided in *Rutherford v. Rutherford*.^(k)

(i) 2 Barb. Sup. Ct. Rep. 385.

(j) 2 Barb. S. C. R. 200.

(k) 1 Denio, 33.

So in *Brown v. De Selding*,^(l) the testatrix made no formal request to the witnesses. She appeared to have been entirely silent. But when an attendant, her sister, stated to Dr. Johnston, the physician, that her sister wished to execute a will, he said, if she wished do so it would be best to have another witness, and he went out immediately and brought in Mr. Zevely, the other witness. The testatrix made no objection then, nor when the doctor returned; on the contrary, she got up and went to the table where the will was lying. Upon Mr. Zevely's coming into the room, after she was seated at the table, he was introduced to her by the doctor, as a person whom he had invited to come in and witness her signature to the will, and she bowed her head in recognition, and then distinctly asked where she must sign, according to Zevely's testimony, or according to Dr. Johnston's, where she must sign the will. She then signed it in their presence, and they signed their names as witnesses. "There can be no doubt," said the court, "from all the circumstances, that she assented to and adopted the acts of her sister and Dr. Johnston in relation to the latter witnessing and inviting Mr. Zevely to witness the execution, and this ratification and adoption is clearly equivalent to an express request by her."

When all the circumstances show the design of the testator to execute his will, his knowledge of the character of the instrument, and the purpose for which the witnesses attend, his signing the instrument, and acknowledging it to be his will, his observing the witnesses sign, and then taking the executed paper into his own possession without objection or comment, sufficiently establish and imply a request to the attesting witnesses to join in the necessary formalities.

Thus, where a will, prepared by the counsel of the decedent, pursuant to her directions, was handed to her by one of the subscribing witnesses, who stated that he came "to witness her signing her will," and the testatrix, having read it, declared it to be her will, and signed it, and both witnesses subscribed their names in her presence, it was held, that there was sufficient evidence of a *request* to the witnesses to attest the instrument.^(ll)

A request to sign as witnesses may be communicated by signs, or may be implied from the acts of the parties.

So it is a good request if one of the witnesses ask the testator in the presence of the other witnesses, whether he wishes them to sign the will as witnesses, and the testator answers "yes." Thus, in *Lyon v. Smith*,^(m) Schoonhoven, one of the attesting witnesses, testified that Boardman, another attesting witness, who was without the jurisdiction, and not examined, after reading or explaining the will to the testator, asked him, "whether he wanted us to sign it as witnesses? and he said "yes." Boardman named myself, my sister, and himself." The three persons thus named attested the execution. This was deemed a sufficient request.

But in the case of the will of Henrietta Hicks, deceased, before the surrogate of the county of New York, where Terry, one of the wit-

(l) 4 Sandf. Sup. Ct. Rep. 10.

(ll) *Hutchings v. Cochrane*, 2 Bradf. Sur. Rep. 295. See, also, *Moore v. Moore*, Ib. 261.

(m) 11 Barb. S. C. R. 124.

esses, testified: "The testatrix then requested me to sign it as a witness. The words, as near as I can recollect, were, 'Nathaniel, will thee sign.'" And Rudd, another of the witnesses, testified: "Mr. Nathaniel Terry requested me to put my name to the paper as a witness. The testatrix did not ask me; there was nothing said by her to me about it. I do not know whether the testatrix heard Nathaniel Terry ask me to sign it; he spoke loud enough for her to hear. She was not, that I heard, asked to make any acknowledgments in respect to it." It was held that there was not a request to each of the attesting witnesses in compliance with the requirement of the statute. "There is no direct evidence," said the surrogate, "that she authorized Terry to request Rudd. Had Terry said, in the presence and hearing of the testatrix and Rudd, that the testatrix requested him to become a witness, even if she said nothing, it would be considered a good request by her. No communication between a testator and a subscribing witness can be made by a third person in behalf of such testator, unless it be made in the presence and hearing of the testator and the witness to whom the communication is intended to be made. Subject to this rule, any declaration or request required in the ceremonials of execution may be made by a third person, and not otherwise. It is not proved that the testatrix requested Rudd to sign this will as a witness. My decision, therefore, is, that the will is not proved to have been executed in due form of law in respect to * * * the request to the witnesses."

Upon appeal, however, to the circuit judge of the first circuit, the sentence of the surrogate was reversed, and on this point the learned circuit judge said: "In the case of *Rutherford v. Rutherford*,⁽ⁿ⁾ the court held that it would have been proper for the jury to have found that the testator's sending for the witnesses, and the request to him made by the other witness in the testator's presence, were, in effect, a request made by the testator, and the surrogate understands the rule to be, that the request may be made by a third person in the presence and hearing of the testator and the witness. This is undoubtedly the sound rule, and its application to the testimony seems to me to relieve the case of all its difficulties. Terry was requested by the testatrix. There is no difficulty as to him. Rudd went to the house solely for the purpose of witnessing the execution of the will. He saw it executed, and in the presence and hearing of the testatrix, he was requested by Terry to sign as a witness. It may be literally true, as remarked by the surrogate, that "it is not proved that the testatrix requested Rudd to sign the will as a witness," but it is also true that he was so requested by a third person in her presence and hearing. As this has been held to be enough in 1 Denio, as the surrogate understands it to be enough, and as I think such is the true rule, it seems to me that the conclusion ought to have been that the will was duly proved; such at least is the conclusion which I draw from the premises."

Again, in *Nelson v. McGiffert*,^(o) where the testator went with his son in law to the store of one of the subscribing witnesses, with the will already prepared for execution; apparently for the sole purpose

(n) 1 Denio, 36.

(o) 3 Barb. Ch. Rep. 163.

of having it executed in the presence of such witness, and in the presence of others who were acquainted with the testator; and all the witnesses testified to facts from which it might fairly be inferred that they attested the execution of the will in conformity with the wishes of the testator, although there was some indistinctness in the recollection of two of the witnesses, whether the request to them emanated directly from the testator or from the son in law, in his presence, and in respect to one of these whether from either, and there was no pretence that the testator was not perfectly competent to make a valid will, and to understand the nature of the act he was about to perform; it was held that a sufficient request to the witnesses was established. "Not only the witnesses, but the testator himself," said the Chancellor, after reciting the facts, "must, therefore, have understood that they were witnessing the execution of the will in conformity to his desire and wish; although he may not have said in terms, 'I request you and each of you to subscribe your names to this my will.'" If such a formal request was necessary to be proved, in all cases, and the witnesses were required to recollect the fact, so as to be able to swear to it after any considerable lapse of time, not one will in ten would be adjudged to be valid. In the execution of wills, the statute does not require any particular form of words to be used by the testator, either in the admission of his signature, in the publication of the instrument as his will, or in the communication to the witnesses of his request or desire that they should subscribe their names to the will as attesting witnesses to the fact of its due execution by him. But it is sufficient if the formalities required by the statute are complied with in substance."

"I think," says Mr. Justice Hand, in *Butler v. Benson*,^(p) "in ordinary cases, a request may be presumed, where two persons are called in to witness a paper, which they do, in the presence of the testator, he at the same time subscribing it, and declaring that it is his last will and testament. There is a purpose and entirety in the transaction, that favors a pretty liberal intendment as to his wishes." But where it appeared that the subscribing witnesses attended at the request of one of the executors and trustees, and signed their names as attesting witnesses at the request of another; and there was no evidence that the testatrix requested the witnesses to attest the execution; or knew that they were there for the purpose of attesting the execution of her will; or that they were in attendance at all; it was held that this was not a compliance with the statute.^(pp)

The statute is silent as to the witnesses signing in the presence of the testator. That was necessary here before the revision in 1830, and has been in England, certainly, since 1677.^(q) "It is believed," says Mr. Justice Hand, in *Butler v. Benson*,^(r) "the requirements of the statute are merely cumulative, and that this is still necessary." The point, however, did not arise in the case before the learned justice. The requirements of the present statute can hardly be said to be "cumula-

(p) 1 Barb. Sup. Ct. Rep. 526.

(pp) *Burritt v. Silliman*, 16 Barb. S. C. R. 198.

(q) 1 R. L. 1813, 364; 29 Car. II, ch. 3.

(r) 1 Barb. S. C. Rep. 526, 530.

tive," to those provided by the former law, supposing that to have now any vitality, as that law prescribed the solemnities for the execution of devises of land only, whilst the present statute concerns wills, whether of real or of personal property. But the previous act has been expressly repealed,(rr) and none of the English statutes are any longer to be considered as laws of this state.

The revisers in their report to the legislature on the law relative to wills, reported a section for the execution of wills of real estate, as has already been seen,(s) substantially the same as the former second section of the act concerning wills in the Revised Statutes of 1813, and expressly requiring in respect to such wills, that the attesting witnesses should "subscribe their names as witnesses *in the presence of the testator.*"(t) The requirement that the witnesses should affix their places of residence to their signatures, "to facilitate the proof of wills, and the detection of forgeries," was also originally proposed to attach to wills of real estate only. With respect to the execution of wills of personal property, they proposed to leave the law the same as it stood previously, except that they recommended that the requisite ages for competency should be defined and reported, a provision requiring two witnesses to a will of personal property, where the testator was under twenty-one years of age, or where the name of the testator was written by his direction.(u) When these propositions came before the legislature, they saw fit to frame the present 40th and 41st sections, abolishing all distinctions between the manner of executing wills of real, and wills of personal estate, requiring the same formalities in respect to both, and applying all the new facilities for proof and preventatives of fraud, recommended by the revisers to wills of either or both species of property. In framing the subdivision now under consideration, they omitted any express requirement that the attesting witnesses should sign in the presence of the testator.

Under the previous statute, the doctrine of a constructive presence of the testator had arisen, and had been carried very far; and it had been decided, that if the witnesses were within view, and where the testator *might*, or had the capacity to see them with some little effort, if he had the desire, though in reality he did not, they were to be deemed subscribing witnesses *in his presence.*(v) The present statute drops the direction in the former statute relative to wills of real estate, that the witnesses should subscribe *in the presence of the testator*, and "the doctrine of constructive presence," says Chancellor Kent, "is thereby wisely rejected."(w)

This question has been expressly adjudicated in two reported cases,(x) and in both it has been determined that it is not necessary that the attesting witnesses should sign their names in the presence of the testa-

(rr) See General Repealing Act, passed December 10, 1828, sec. 1, clause 95.

(s) *Ante*, p. 80.

(t) See 3 R. & or. S. (2d ed.) Appendix, 627.

(u) *Ib.* 629.

(v) 4 Kent's Comm. 515; 7th ed. 574-5, where the cases are collected.

(w) *Ib.* 515, 574.

(x) *Ruddon v. McDonald*, 1 Bradf. Sup. Ct. Rep. 352; *Lyon v. Smith*, 11 Barb. Sup. Ct. Rep. 124.

tor, in the strict sense of the express requirement of the former law. In *Ruddon v. McDonald*, the testatrix subscribed the will in a small bedroom, and the witnesses signed in an adjoining room. The door between the two rooms was open, but the place where the witnesses signed, was in a part of the room where the testatrix could not see the witnesses in the act of signing, without putting her head down towards the foot of the bed, if she could then; and they did not look to be able to say whether they could see her face at the time or not. In *Lyon v. Smith*, the subscribing witnesses did not attest in the presence of the testator, but did it in an adjoining hall, and out of the sight of the testator; and it was held in each case, that the attestation was sufficient. Both decisions were put upon the ground, that the omission from the present statute of the clause contained in the former act, requiring the witnesses to attest and subscribe the will in the presence of the testator, under the circumstances above mentioned, was a clear indication of an intention on the part of the legislature to change the law in that particular. The object of the old rule was to prevent imposition by changing the paper. The present statute, it is reasonable to presume, is also to be construed with a view to the prevention of the same evil practices. The former statute did not require the testator to sign in the presence of the witnesses, the present does. The former required the witnesses to attest and subscribe in the presence of the testator, the present does not. The insertion of the first requirement is perhaps to be regarded as a compensation for the omission of the latter; but it is a necessary requisite of an attestation to any instrument, that the witness subscribe at the time of the execution, or acknowledgment thereof, and with the knowledge and consent of the one who executes the instrument.^(y) A strict observance of this rule, is especially demanded as a safeguard against fraud in the execution of wills, and nothing less than this will satisfy the present provision.

Of the Execution of Wills by Blind Persons, and by Persons Deaf and Dumb.

Concerning the execution of the will of a blind testator, no enactment is made in this statute; and consequently he, as well as others, must comply, as far as he is able, with the requisitions of a statute out of which he is not excepted. He must subscribe the will in the presence of the attesting witnesses, or get some other person to sign his name for him, and acknowledge that signature as having been made by his direction and in his presence, and he must declare the instrument so subscribed to be his last will and testament, and request the witnesses to sign it as such. The suggestions of Chancellor Walworth in *Chaffee v. The Baptist Missionary Convention*,^(z) for the execution of a will by a person not capable of reading or writing, apply with the greatest force to the execution of a will by a blind person. "It would be proper that the whole will should be deliberately read over to him in the presence and hearing of the witnesses, and the fact of such reading in

^(y) *Lyon v. Smith*, 11 Barb. S. C. Rep. 126, per Shankland J.; *Henry v. Bishop*, 2 Wend. 575; *Hollenback v. Fleming*, 6 Hill, 303.

^(z) 10 Paige, 90.

his presence should be stated in the attestation clause, or at least the witnesses ought, by inquiries of the testator himself, to ascertain the fact that he was fully apprised of the contents of the instrument which he executed and published as his will, as well as that he was of competent understanding to make a testamentary disposition of his property." (a) The attesting witnesses must of course sign their names as witnesses, as in the ordinary case.

There has heretofore been occasion to remark in the course of the consideration of the several provisions of the statute, that persons not able to speak, in which description may be included deaf and dumb persons, may make an acknowledgment of subscription or a publication of a will by signs. (b) But the greatest pains and caution are demanded in these cases, in order satisfactorily to ascertain and establish that the testator is mentally competent to the execution of a will, and that he fully comprehends the nature of the act he is about performing, and the disposition of his property made by the alleged testamentary instrument.

The authorities with respect to the Statute of Frauds, appear to apply to the present statute, upon the question whether an unattested will or other paper may be rendered valid as a testamentary disposition, by being referred to and adopted by a will properly attested. Those authorities have established, that if the testator, in a will or other testamentary paper duly executed, refers expressly to an existing unattested will or other paper, the instrument so referred to becomes part of the will. (c) The object of the change in the words of the present statute from those of the former statute, by which the subscription of the testator and the attestation of the witnesses are required to be at the end of the will, was to insure a signature of authentication, distinct from and at the close of the descriptive and disposing parts of the will; and the practice of making the references spoken of, has not, it is believed, at any time resulted in any mischief or inconvenience. Whether the two papers, the will and the paper referred to therein, are brought together by being attached, at the time of the execution of the one or not, can have no other effect than as to the identity of the one referred to. If annexed, the identification may perhaps be more satisfactory in many cases than it would otherwise be. But the effect or character of it is not at all changed. The contents of the paper, so far as referred to in the instrument executed, become constructively a part of the latter, and in that respect they make together one instrument, although in fact existing in two distinct papers, whether attached together or not. (d) But whether the paper referred to be attached to the will or not, the reference must

(a) See also *Weir v. Fitz Gerald*, 2 Bradf. Surr. Rep. 42.

(b) See *ante*, p. 77.

(c) *Habergham v. Vincent*, 2 Ves. jun. 228; and see cases under both the Statute of Frauds and the recent English Statute; *Wms. on Exrs.* 80; *Tonnele v. Hall*, 4 Comst. 140; *In the Goods of the Rev. Geo. Hunt*, 2 Robert. 426; *In the Goods of Hillhouse*, 17 Jur. 1186.

(d) *Tonnele v. Hall*, 4 Comst. 144, 146.

be distinct, so as to exclude the possibility of mistake; and the paper referred to must be already written.(e)

If any person be a subscribing witness to the execution of a will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate is made to such witness, the will is not on that account invalid, but if such will cannot be proved without the testimony of such witness, the devise, legacy, interest or appointment is void so far only as concerns such witness or any claiming under him, and such person is a competent witness, and compellable to testify respecting the execution of the will in like manner, as if no such devise or bequest had been made. But if such witness would be entitled to any share of the testator's estate in case the will were not established, then so much of the share that would have descended or have been distributed to such witness is saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised and bequeathed to them.(f)

If by any will any real estate be charged with any debt, and the creditor whose debt is so charged attest the execution thereof, such creditor, notwithstanding such charge, is a competent witness to prove the execution of such will.(g)

In acting upon the doctrines established by the authorities, which there has been occasion to cite in the foregoing pages, no little difficulty has occurred with respect to the evidence given by the subscribed witnesses of the circumstances attending the attestation, particularly where the witnesses have been examined for the first time, (as must very often happen,) at a period long after the transaction. For it may be that they have no recollection at all on the subject, so that they are quite unable to affirm that the will was executed according to the statute; or it may be that one affirms and the other negatives, or that both negative a compliance with the statute. The result of the cases on this subject appears to be, that although the party propounding the will must examine the attesting witnesses, if they be within the jurisdiction, it is not absolutely necessary, for the validity of the will, to have their positive affirmative testimony that all the formalities prescribed by the statute were actually observed in the execution of the will. For if the will on the face of it appears to be duly executed, the presumption is *omnia esse sicut acta*.(h) "Where," says the Chancellor, in *Jauncey v. Thorne*,(i) "there is good reason to suppose the will has been duly executed, and that no fraud or want of testamentary capacity existed at the time it was made, justice to the dead as well as to the living, requires that the declared wishes of the testator should not be defeated by the imperfect recollections of the attesting witnesses, or by reason of their deaths or removal beyond the jurisdiction of the state. It is for this reason that the most liberal presumptions in favor of the due exe-

(e) Wms. on Exrs. 80, and cases cited. See also *Thompson v. Quimby*, 2 Bradf. Surr. Rep. 449; *In the Goods of Hunt*, 2 Robert. 622; *In the Goods of Hillhouse*, 17 Jur. 1186.

(f) 2 R. S. 65; 4th ed. 247, secs. 50, 51.

(g) 2 R. S. 57; 4th ed. 241, sec. 6.

(h) See Wms. on Exrs. 83.

(i) 2 Barb. Ch. Rep. 59.

cution of wills, are sanctioned by courts of justice, where from lapse of time or otherwise, it may be impossible to give positive evidence on the subject. A will may, therefore, be sustained even in opposition to the positive testimony of one or more of the subscribing witnesses, who, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if from other testimony in the case the court or jury is satisfied that the contrary was the fact. And where any of the witnesses are dead, or in such a situation that their testimony cannot be obtained, proof of their signatures is received as secondary evidence of the facts to which they have attested by subscribing the will as witnesses to the execution thereof.^(j) The same rule is frequently applied to the case of a subscribing witness who is called and sworn, but who, from defect of memory, has no recollection of the transaction except that his signature to the will is genuine." So where the witnesses have signed their names to a full attestation clause, the mere inability of the witnesses to recollect whether the requirements of the statute had or had not been complied with, would not be sufficient to invalidate the will, unless it appeared that they signed their names to the attestation clause without hearing it read or knowing what was contained therein,^(k) and where one of the subscribing witnesses to the will swears that all the formalities required by the statute were complied with, the will may be admitted to probate, notwithstanding the other subscribing witnesses may not be able to recollect the fact. Thus in *Nelson v. McGiffert*,^(l) where the subscribing witnesses, after the lapse of eight years, did not all recollect whether they attested the execution of the will at the request of the testator, or at the request of his son in law who was present at the same time; and one of them had a vague impression that it was the son in law who requested them to subscribe the will as witnesses, but another swore positively that they all attested the execution of the will at the request of the testator and in his presence, it was held that the proof was sufficient.^(m) Again, where the

(j) See *Brinckerhoff v. Remsen*, 8 Paige, 499, per Walworth, Chancellor; *Remsen v. Brinckerhoff*, 26 Wend. 338, per Verplanck, Sen.; *Chaffee v. Bap. Miss. Con.*, 10 Paige, 91, per Walworth, Chan.; *Butler v. Benson*, 1 Barb. Sup. Ct. Rep. 526, 538; *Price v. Brown*, 1 Bradf. Surr. Rep. 291; *Peebles v. Case*, 2 Bradf. Surr. Rep. 226; *Thompson v. Hall*, 2 Robert. 426.

(k) 8 Paige, 499; 26 Wend. 338; 10 Paige, 91; *Grant v. Grant*, 1 Sandf. Ch. Rep. 235, 240.

(l) 2 Barb. Ch. Rep. 158, 162.

(m) In *Brenchley v. Lynn*, (16 Jur. 226; 9 Eng. L. & Eq. Rep. 563; 2 Robert. 162, 441,) the question was whether the testatrix, *E. Lynn*, a married woman, deceased, signed her name before or after the witnesses subscribed. The two witnesses to the will were Esther Ruddick and Catharine Dawson. Esther Ruddick testified that the deceased, who had sent for Catharine Dawson, requested the witness and Catharine Dawson to witness her revocation, (which was the nature of the instrument in question,) as she called it, at the same time the deceased produced the paper from her pocket-book. "She told us," the witness continued, "it was a revocation of her last will and testament. I think Catharine signed first; I then signed my name, and I think Mrs. Lynn then signed her name. I remember the deceased observing, 'What a bad pen it is.' I recollect distinctly she took the pen I had used, and made the observation I have just mentioned." According to the witness, the date was inserted either before or after the execution. She further said: "I remember we all three were present together, and we all signed one after the other, and I think Mrs. Lynn signed last, but it was all signed before we left the room." So far Ruddick gave her evidence before she had seen the paper; but afterwards, in accordance with the usual course, the paper was produced to her and then she said, "I have now inspected the script marked No. 1, annexed to the affidavit as to scripts," and so forth. She described the paper, and added "That is the very paper I saw the deceased sign. I recognize it by my

will had been executed about ten years before the proceedings for the proof, and one of the subscribing witnesses had nearly forgotten the whole transaction, and the other was almost as much lost on many important points, and the attestation clause was full, and there was not any evidence of fraud or undue influence in the case, or circumstances to awaken suspicion, the court felt constrained, though with much doubt and hesitation, to sustain the will.⁽ⁿ⁾ So in the case of the will of Sarah Stake, deceased, before the surrogate of the county of New York,^(o) where there was a full attestation clause to the will, and one of the witnesses was a lawyer of repute, (the late Gen. Robert Bogardus,) who was dead at the time of the proceedings, and the other witness, on his examination, testified that he saw the testatrix have the will in her hand—whether she read it or not he did not remember—"I remember," he continued, "that the paper was handed to her by the

(n) *Buller v. Benson*, 1 Barb. S. C. Rep. 526, 538.

(o) M. S., Hon. David B. Ogden, Surrogate.

signature, 'Esther Ruddick,' to it. I remember the deceased observing that she must date it, and I think she put the date in before we signed our names; but I cannot help thinking the deceased must have signed after I had signed my name; she did it." Catharine Dawson, the other subscribing witness, testified: "The deceased told me she wanted me to sign a paper, which she took out of a small desk that was always on the table. She told me it was a codicil to her last will and testament, to revoke all her former wills. She then gave me the paper and told me where to sign my name, and I signed my name. I then made way for Esther to sign her name, and then Mrs. Lynn took the paper and she signed her name. I am not sure, but I think I saw her put in the date as well; however, she did not sign her name until after we had signed ours. I distinctly remember we were all present at the time, and we signed in each other's presence, and before either of us left the room." And after stating the testatrix's directions as to the subsequent custody of the paper and the condition of her mind, the script was at this stage of the proceedings shown to the witness, and then, after identifying it, she said: "I remember the deceased telling me where I was to sign, and telling Esther to sign under me, and she then observed: 'And I must not sign in the same place,' and then I saw her sign. I now distinctly recollect that the said deceased wrote something before we signed our names, and I have no doubt it was her signature, because, after we had signed, I distinctly remember the deceased saying that it was not dated, and she must have put in the date after we had signed, and that was all she did after we had signed. In fact, I was so flurried at first, I did not distinctly remember, but when I saw the paper I then recollected all the business." "I have no doubt," says Sir H. Jenner Fust upon this case, "the transaction did take place in the manner in which it was intended to take place, and in compliance with the requisites of the statute. Grievous, indeed, would be the state of the law, if, upon the loose recollection of witnesses as to the order in which the execution took place, the intentions of the testatrix were to be defeated. Difficulties must arise in many cases where witnesses are deposing after a very considerable period of time from the transaction in question. Where both attesting witnesses positively declare that they did not sign their names till after the deceased had signed, the case is conclusive, unless there be evidence to contradict them. Where the witnesses differ, the court must judge which is the more likely to be correct in the account given. Where the witnesses depose with doubt and hesitation, the court must look at all the circumstances, and see on which side the preponderance of probability rests. In former cases, where the witnesses have deposed, the one positively that the will was not executed in his presence, and the other as positively declared that it was, the court has given the preponderance to the witness deposing affirmatively, in accordance with the fact set forth in the attestation clause. Here, both witnesses, in the first instance, considered the transaction to take place in the manner they at first represented; but the second of the witnesses positively declares after seeing the paper, that she distinctly remembers that the date, and not the signature of the testatrix, was inserted after they subscribed, and she accounts for her previous mistake by stating she was at first flurried. Under these circumstances I am clearly of opinion that the court is bound to pronounce for the validity of the instrument; accordingly I pronounce for its validity, and decree probate of it. I have no doubt about the case, not the least in the world." This decision was, on appeal, affirmed, with costs. See 2 Robert. 441.

lawyer, and that there was some sort of acknowledgment, I cannot say what it was. I believe that she acknowledged it to be her last will, but I have no recollection of it. The lawyer said it was her will in her presence and in mine. I heard her voice, but do not remember what she said." The will was sustained. "I cannot," said the surrogate, "rely upon the testimony of this witness to overcome the weight which, under the circumstances of the case, the signature of Mr. Bogardus has upon my mind. I therefore decide that this will was properly executed, and I admit it to probate."(*p*)

Where, however, the attesting witnesses state facts, (not contradicted by other testimony,) which demonstrate that the will was not duly executed and attested, and there are no circumstances on which the court can found an inference that the recollection of the witnesses is infirm on the subject, the will must be pronounced against, notwithstanding it should be all in the handwriting of the deceased, and be signed by him and profess to be duly attested.(*q*)

The Form and Language of a Will.

The law has not made requisite to the validity of a will, that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appears to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded.(*r*)

The Ecclesiastical Courts in England, and the same may be said of the Surrogates' Courts here, do not confine the testamentary disposition to a single instrument; but they will consider several, of different natures and forms, as constituting altogether the will of the deceased.(*s*)

(*p*) In *Peebles v. Case*, (2 Bradf. Surr. Rep. 226,) there were two wills bearing the same date, purporting to be attested by the same witnesses, and both in the handwriting of the decedent—one was recognized and proved by both the witnesses, but they denied any knowledge of the other—the latter was admitted to probate as the last will, notwithstanding the denial of the witnesses, upon evidence of handwriting, identification of the instrument as recognized by the decedent, memoranda in the handwriting of the deceased, and other circumstantial evidence.

(*q*) In the *Matter of proving the will of Emanuel Abrams, dec'd*, cited *ante*, p. 81; *Brinckerhoff v. Remsen*, 8 Paige, 488; In the *Matter of proving the will of Mungo Currie, deceased*, cited *ante*, p. 85; *Remsen v. Brinckerhoff*, 26 Wend. 325; *Chaffee v. Bap. Miss. Con.*, 10 Paige, 85; *Brown v. De Selding*, 4 Sandf. Sup. Ct. Rep. 10; *Lewis v. Lewis*, 1 Kernan, 220; *Noding v. Alkison*, 14 Jur. 904; 2 Eng. L. and Eq. Rep. 594; See also Wms. on Exrs. 84-5; *Ex parte Beers*, 2 Bradf. Surr. Rep. 163; *Wilson v. Hetterick*, *Ib.* 427.

(*r*) 1 Jarman on Wills, 1.

(*s*) Wms. on Exrs. 88, and cases cited *n. u*; In the case of the last will and testament of Catharine Macabee, deceased, before the surrogate of the county of New York, one will of the testatrix, devising her real estate only but appointing an executor, had been proved; afterwards, two other instruments, both, however, written on the same sheet of paper, one dated previously and the other subsequently, to the will already proved, were propounded for probate, and the surrogate admitted them as together with the will already proved, constituting the last will and testament of the real and personal estate of the testatrix. *Campbell v. Logan*, 1 Bradf. Surr. Rep. 90.

It is immaterial in what language a will is written, whether in English or in the Latin, French or any other tongue.^(t)

The established doctrine of the authorities and cases previous to the Revised Statutes, by which deeds, indentures, marriage settlements, drafts, sketches of wills, instructions for wills, and indeed almost any paper writing were admitted as valid wills of personal property, can scarcely be considered as applicable under the system introduced by the Revised Statutes. Such instruments or papers are never subscribed, published and attested with the formalities prescribed by the section of the statute, which has been examined in the foregoing pages, and a paper not so executed, is, under the present law, fatally deficient in the essential requisites of a will.

Of the Material with which a Will may be written, and of the Person who may be the Writer, and herewith of a Will prepared by a Legatee.

There are scarcely any restrictions with respect to the materials on which, or by which a testamentary document may be executed. Thus, a will or codicil, or any part thereof, may be made or altered in pencil as well as in ink.^(u) The alterations, however, must be executed, published and attested, in conformity with the statute, otherwise they will be of no effect; which amounts to a republication of the will.

By the civil law, if a person wrote a will in his own favor, the instrument was rendered void.^(v) That rule has not been adopted in its full extent by the law of England or of this state, which only holds that where the person who prepares the instrument or conducts its execution, is himself benefited by its dispositions, besides being subject to the general rule, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court, that the instrument so propounded is the last will of a free and capable testator. This benefit to such legatee is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied, that the paper propounded does express the true will of the deceased. Nor does the law determine that the act is absolutely void, even though the person drawing the will in his own favor, is the confidential agent or attorney or adviser of the testator. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all, varying according to the circumstances, for instance the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circum-

(t) Swinb. part 4, sec. 25, pl. 3.

(u) See Wms. on Exrs. 91.

(v) Dig. lib. 48, tit. 10, sec. 15, and lib. 34, sec. 8; Wms. on Exrs. 91; 4 Barb. S. C. R. 398.

spection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction, that the instrument did express the real intentions of the deceased. And in such cases, even if the testator's capacity is doubtful, there is not any technical rule which requires proof that the will has been read to or by the deceased, or that it was prepared from instructions given by him. The court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it cannot in every case require it. If satisfied that the instrument contains the real intentions of the testator, although there is no proof of reading over, and no proof of instructions, it will grant probate of it.^(w)

Of Nuncupative Wills.

A nuncupative testament is where the testator, without any writing, doth declare his will, before a sufficient number of witnesses.^(x) Before the Statute of Frauds, it was of as great force and efficacy (except for lands, tenements and hereditaments) as a written testament.^(y) But as wills of this description are liable to great impositions, and may occasion many perjuries, that statute (29 Car. II, ch. 3) laid them under several restrictions; except when made by "any soldier" being in actual military service, or any mariner or seaman being at sea.^(z) The statute of this state, "to reduce the laws concerning wills into one statute," passed February, 20th, 1801,^(a) copied substantially all the restrictions of the 29 Car. II, upon the making of nuncupative wills; and so did the act "concerning wills," passed March, 5th, 1813,^(b) and both contained the provision that soldiers in actual military service, and mariners or seamen being at sea, might dispose of their personal estates in the same manner as if those acts had not been passed. Those two statutes of this state have long since ceased to exist, and in their place, on the revision of the statutes which took effect in 1830, the present statute "of wills and testaments of real and personal property, and the proof of them" was enacted. With respect to nuncupative wills, that statute provides as follows:

Sec. 19. [Sec. 22.] No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner, while at sea.^(c)

(w) *Barry v. Bullin*, 1 Curt. 637; *S. C.*, 2 Moore, P. C. C. 480; *Wms. on Exrs.* 91 to 96, and cases cited; *Crispell v. Dubois*, 4 Barb. S. C. Rep. 393; *Greville v. Tylee*, 7 E. F. Moo. 320.

(x) *Swinb.* part 1, sec. 12, pl. 1; *Godolph.* part 1, ch. 4, sec. 6; 7 *Bac. Abr.* 305, tit. *Wills and Testaments D.*

(y) *Swinb.* part 1, sec. 12, pl. 3; *Godolph.* part 1, ch. 4, sec. 6.

(z) See 2 *Black. Comm.* 500; 4 *Kent's Comm.* 516; *Hubbard v. Hubbard*, 12 Barb. Sup. Ct. Rep. 153-4.

(a) *Kent & Radcliff's Revision*, vol. I, p. 181, ch. 9, secs. 14 and 15.

(b) *Van Ness & Woodworth's Revision*, vol. I, p. 367, ch. 23, secs. 14 and 15.

(c) 2 *R. S.* 50; 4th ed. 243. There is a marked inconsistency between this section of the statute, and the 40th section already treated of. This section allows of unwritten wills of personal estate in the cases specified, but the 40th section in express terms prescribes that "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner," and then follows the enumeration of the formalities which have been considered, utterly incompatible with the making of unwritten wills, and dis-

In respect to all but the two classes of soldiers and mariners, the right to transmit personal property by means of an unwritten will, was first greatly circumscribed and then taken away altogether. The imminent dangers, the diseases, disasters and sudden death, which constantly beset soldiers and sailors; the utter inability oftentimes to find the time or the means to make a deliberate and written testamentary disposition of their effects, seem at all times to have made them a proper exception to the operation of a rule, which the wisdom of later times has found it expedient, if not absolutely obligatory, to apply to all others.(cc)

In England by the new Statute of Wills, (1 Vict. ch. 26,) nuncupative wills (or other testamentary dispositions) are altogether rendered invalid. The exception, however, in favor of soldiers and mariners, is continued by the 11th section of the statute, which provides and enacts that "any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act."

This privilege, as it respects soldiers, has been held to be confined by the insertion of the words "actual military service," to those who are *on an expedition*; and consequently it has been decided, that the will of a soldier made while he was quartered in barracks, is not privileged.(d)

With respect to the exception of "any mariner or seaman being at sea," in a case where the testator was commander in chief of the naval force at Jamaica, but lived on shore at the official residence with his family; it was held that he did not come within the exception, for that he was not "*at sea*" within the meaning of that expression in the act; and consequently, that a nuncupative will made by him on shore was invalid.(e) But in a late case on motion,(f) the unattested will of a seaman,—who, while on board of a vessel lying in the harbor of Buenos Ayres, on the 4th of November, 1839, obtained leave to go on shore, where he met with an accident, and was thereby so severely injured that he died on shore on the 9th,—was admitted to probate as being within the exception. And the court distinguished the case from that just cited, where the testator was living on shore at Jamaica, only occasionally going on board his ship; but this was to be regarded as the

tinely and irresistibly implying that the will must be in writing. And if the latter section is paramount to the previous, nuncupative or unwritten wills are entirely abolished. The plan proposed by the revisers was consistent in all its parts. Wills of personal property were to be executed as formerly, nuncupative wills were to be allowed, only in the cases of seamen and soldiers, and wills of real estate were to be in writing, and executed with substantially the same formalities as were prescribed by the Statute of Frauds. (See 3 R. & or. S. (2d ed.) Appendix, 627, 629.) The legislature having determined to require wills of real and wills of personal property, to be executed in the same manner, seem to have forgotten that they had already, adopting a part of the plan of the revisers, allowed of unwritten wills in certain cases, and framed a section which by necessary implication requires wills to be in writing in all cases.

(cc) 12 Barb. Sup. Ct. Rep. 155, per Brown, J.

(d) *Drummond v. Parish*, 3 Curt. 522; *White v. Repton*, 3 Curt. 818. See *In the Goods of Phipps*, 2 Curt. 368; *In the Goods of Johnson*, 2 Curt. 341; Wms. on Exrs. 96.

(e) *The Earl of Euston v. Seymour*, cited *per curiam*, 2 Curt. 339; 3 Curt. 530.

(f) *In the Goods of Lay*, 2 Curt. 375.

will of a seaman "at sea," although the deceased was not actually on board ship at the time the will was made.

In the recent case of *Hubbard v. Hubbard*,^(g) in this state, the testator was, at the time of his death, the master of a coasting vessel employed in the transportation of coal from the city of Philadelphia to one of the eastern ports, and the alleged testamentary words were spoken by him on board of the vessel in his last illness, while the vessel with her cargo on board, was lying at anchor, wind bound, at the mouth of Delaware Bay, under the breakwater, and about a mile distant from the main land, and three miles from the nearest settlement; and the place where the vessel lay, the bay between Capes May and Henlopen, is eighteen miles wide, and the tide ebbs and flows six feet. It was held that the testator was a mariner "at sea" within the meaning of the terms of the statute.

As to the construction of the words "mariner or seaman" in the exception in the English act, it has been held that the purser of a man of war is within this description, and it should seem that it includes the whole service, applying equally to superior officers up to the commander in chief, as to a common seaman being at sea. And it has also been held to apply to *merchant* seamen.^(h) In *Hubbard v. Hubbard*, in this state above cited, the testator was the *master* of the vessel and in the *merchant* service. In the Admiralty law, women as well as men employed on board of a vessel to promote the purposes of the voyage, are *mariners*.⁽ⁱ⁾

The right, however, of a soldier in actual military service, or of a mariner at sea to make an unwritten will, is not an unqualified right which may be exercised under all circumstances. As the making of such wills can only be justified upon the plea of necessity, so they will only be tolerated when made *in extremis*.^(j)

The statute does not anywhere prescribe the circumstances which must attend the speaking of the words, or the formalities requisite to be observed, to render valid a nuncupative or unwritten will. The common law in respect to these matters, is, therefore, the guide in such cases. It is laid down by an authority, that a will by word or without writing is where a man is sick, and for fear that death or want of memory or speech should surprise him, that he should be prevented if he staid the writing of his testament, desires his neighbors and friends to bear witness of his last will, and then declares the same presently by word before them.^(k) But it seems the *rogatio testium*, or calling upon persons to bear witness to the act is not necessary. Thus, in *Hubbard v. Hubbard*, above cited, the testator was asked by the mate of the vessel, who was one of the witnesses to the will, whether he had a will; he said no, that he had had one, but that it was destroyed. He was

(g) 12 Barb. Sup. Ct. Rep. 148.

(h) Wms. on Exrs. 97, and cases cited.

(i) Benedict's Admiralty, 158. In England, notwithstanding the general provisions of the act, it has been held that a minor may make his will if he falls within the exception as being "in actual military service," &c.; the words of the clause being "any soldier," &c. *In the Goods of Farquhar*, 4 Notes of Cases, 651, 652; Wms. on Exrs. 98.

(j) 12 Barb. 155-6.

(k) 7 Bac. Abr. 305, tit. *Wills and Testaments D.*

then asked by the mate, what disposition he wished to make of his property; he replied, "I want my wife to have all my personal property." The three other witnesses who were examined, severally stated that they were present when the mate put the questions to the testator as to whether he had a will, and what disposition he wished to make of his property, and that they heard him give the answer as above stated. They all testified that the testator was of sound mind and memory at the time, and not under any restraint. And it was held that the proof established a valid nuncupative will. The case probably furnishes a fair example of the application of the rules of the common law to wills of this nature, and presents the utmost limits within which those rules allow of such a testamentary disposition of property.

Of the Revocation of Wills.

There has already been occasion to observe that a will is, in all cases whatever, a revocable instrument. For, though a man make his testament and last will irrevocable in the strongest and most express terms, yet he may revoke it, because his own act and deed cannot alter the judgment of law to make that irrevocable, which is of its own nature revocable.^(l) A will is, therefore, said to be ambulatory until the death of the testator.^(m)

It has already been stated that a mutual and conjoint will is unknown to the testamentary law.⁽ⁿ⁾ One ground of objection to such an instrument as testamentary, is its irrevocability. However, such a will may, it should seem, in some cases, be enforced in equity as a compact, and such a case was referred to and considered in a note at a previous page, in connection with the subject of mutual wills.^(o)

The following statutory provisions relate to the revocation of wills:

Sec. 35. [Sec. 42.] No will in writing, except in the cases herein-after mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed, or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.^(p)

Sec. 36. [Sec. 43.] If, after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the

(l) *Vynior's Case*, 8 Co. 82 a; Swinb. part 7, sec. 14, pl. 2.

(m) See Wms. on Exrs. 104.

(n) *Ante*, p. 45.

(o) *Ante*, pp. 45, 48; *Dufour v. Pereira*, 1 Dick. 419. See, also, *Walpole v. Lord Orford*, 3 Ves. 402; 1 Add. 278; Jurid. Arg. 272; 2 Jurid. Ex. 101; Wms. on Exrs. 105, 106; *Day, Ex parte*, 1 Bradf. Surr. Rep. 476.

(p) 2 R. S. 64; 4th ed. 246.

testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation shall be received.

Sec. 37. [Sec. 44.] A will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage.

Sec. 38. [Sec. 45.] A bond, agreement, or covenant, made for a valuable consideration, by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.^(g)

Sec. 39. [Sec. 46.] A charge of incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained, shall pass and take effect, subject to such charge or incumbrance.

Sec. 40. [Sec. 47.] A conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property, previously devised or bequeathed by him, shall be altered, but not wholly divested; shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless, in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest.

Sec. 41. [Sec. 48.] But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.^(r)

Sec. 42. [Sec. 49.] Whenever a testator shall have a child born after the making of his will, either in his lifetime or after his death, and shall die, leaving such child, so after born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in his will, every such child shall succeed to the same portion of the father's real and personal estate, as would have descended or been distributed to such child, if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to, and out of the parts devised and bequeathed to them, by such will.^(s)

Sec. 46. [Sec. 53.] If, after the making of any will, the testator shall

(g) 2 R. S. 64; 4th ed. 246-7.

(r) Ib. 65.

(s) Ib. 65; 4th ed. 247.

duly make and execute a second will, the destruction, cancelling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will, or unless after such destruction, cancelling or revocation, he shall duly republish his first will.(t)

The following section of the Revised Statutes, also has a bearing upon the subject of the revocation of wills:

Sec. 88. [Sec. 67.] No will of any testator who shall die after this chapter shall take effect as a law, (31st December, 1829,) shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator; or be shown to have been fraudulently destroyed, in the lifetime of the testator; nor unless its provisions shall be clearly and distinctly proved, by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness.(u)

Revocation by a subsequent Testamentary Disposition.

"Concerning the making of a latter testament," says Swinburne,(v) "so large and ample is the liberty of making testaments, that a man may, as oft as he will, make a new testament, even until his last breath; neither is there any cautel under the sun to prevent this liberty; but no man can die with two testaments, and therefore the last and newest is of force; so that if there were a thousand testaments, the last of all is the best of all, and makes void the former."(w)

With respect further to revocation, by a subsequent will, as provided by the 42d section of the statute, it is to be observed that a subsequent will does not revoke a former one, unless it contains a clause of revocation or is inconsistent with it. Thus in *Nelson v. McGiffert*,(x) the will offered for probate was dated and executed in July, 1832, and the evidence fully established the fact of the due execution of a testamentary paper, by the decedent in 1837, which was not forthcoming, but the parties entirely failed in showing that the latter was a revocation of the will of July, 1832, or that it was inconsistent with that will in any respect, and the prior will was sustained. And where the last will is inconsistent with the former will in some of its provisions merely, it is only a revocation *pro tanto*.(y) Thus, several testamentary papers, all duly executed at different dates, but not containing any clause of revocation, may all be admitted as together constituting the last will of the decedent. And so it was determined in the case of the

(t) 2 R. S. 66; 4th ed. 248.

(u) 2 R. S. 68; 4th ed. 254.

(v) Part 7, sec. 14, pl. 1.

(w) In *Bryan v. White*, (14 Jur. 919; 5 Eng. L. & Eq. 579,) the testator died on the 25th of August, leaving two wills of the 23d and 24th of that month, of a totally different tenor, and the will of the 24th had no words of attestation, although the prior will had a full attestation clause. Upon the evidence in the case it was held, that the presumptions arising against the last will, from the improbability of two wills on two successive days and other circumstances, were rebutted, and the last will alone was established.

(x) 3 Barb. Ch. Rep. 158, 164.

(y) *Brant v. Wilson*, 8 Cow. 56. But see *Plenty v. West*, 1 Robert. 264; 9 Jur. 458; *Plenty v. West*, 17 Jur. 9; 22 Law J. Rep. (N. S.) Chanc. 185; 15 Eng. L. & Eq. Rep. 283; *Richards v. Queen's Proctor*, 18 Jur. 540; *Cutto v. Gilbert*, Ib. 560.

will of Catharine Macabec, deceased, before the surrogate of the county of New York,^(z) where a will disposing of the testatrix's real estate only, but appointing an executrix, had already been admitted to probate, and a subsequent will disposing of personal property without any clause of revocation, was afterwards offered for probate and was admitted, as together with the former constituting the last will and testament of the testatrix. And whether the provisions of the two or more wills under these circumstances were inconsistent with each other, would probably be left to be determined by a court of construction.

Mere proof of the execution of a subsequent will, then, is not sufficient to invalidate a prior will. There must be proof of a clause of revocation or of contrary or inconsistent provisions. And where the contents of the last will cannot be ascertained, it is not a revocation of the former will. This was decided by the Court of King's Bench, in England, more than one hundred and fifty years ago, in the case of *Hutchins, lessee of Nosworthy v. Bassett*.^(a) And that decision was subsequently affirmed upon a writ of error in the House of Lords.^(b) In the subsequent case of *Harwood v. Goodright*,^(c) which came before the Court of King's Bench in 1774, it was held that a former will was not revoked by a subsequent one, the contents of which could not be ascertained; although it was found by a special verdict that the disposition which the testator made of his property by the last will, was different from that made by the first will, but in what particulars the jurors could not ascertain. This case also was carried to the House of Lords upon a writ of error; and the judgment of the Court of King's Bench was affirmed. As these two decisions of the court of *dernier resort* in England were previous to the revolution, they conclusively settle the law on the subject here.^(d) A will duly executed, which in terms revokes all former wills and appoints executors, is, however, a valid revocation of a former will, disposing of a part of the testator's property; although the will containing such clause of revocation makes no disposition of the property embraced in the former will.^(e)

If two inconsistent wills be found of the same date, or without any date, and no evidence can be adduced establishing the posteriority of the execution of either, both are necessarily void, and the deceased must be considered intestate; but in every case the courts will struggle to reconcile them, if possible, and collect some consistent disposition from the whole.^(f)

Again, where there are several codicils or other testamentary papers of different dates, it is a question of intention upon all the circumstances of the case, which and how far either is a revocation of another, or whether the dispositions of the latter are to be considered as additional and cumulative to those of the prior. Parol evidence, however,

(z) February, 1852, Hon. A. W. Bradford, Surr.; *Campbell v. Logan*, 2 Bradf. Surr. Rep. 90. See also *Richards v. Queen's Proctor*, 18 Jur. 540.

(a) Comb. Rep. 90; 3 Mod. 203, S. C.

(b) See *Hungerford v. Nosworthy*, Show. Cases in Parl. 146.

(c) Cowper's Rep. 87.

(d) See the judgment of Chancellor Walworth in *Nelson v. McGiffert*, 3 Barb. Ch. Rep. 162, 165.

(e) In the *Matter of Thompson*, 11 Paige, 453.

(f) See Wms. on Exrs. 136, and authorities cited.

is not to be admitted in order to investigate the *animus* with which the act was done, unless there is such doubt and ambiguity *on the face of the papers*, as requires the aid of extrinsic evidence to explain it.(g)

Previous to the enactment of the above recited 53d section of the statute, it had long been a *vexata questio* whether the principle of law was that, on the revocation of a latter will, a former uncanceled will should revive or not. In the courts of common law the presumption, it was said, was in favor of the revival of the former will; but in the ecclesiastical courts, either an opposite presumption prevailed, or the case was considered to be open without prejudice to the examination of testimony. In both courts, however, the law was undisputed that parol evidence was admissible to ascertain the real intentions of the testator, and to determine the fact of a revival of his will, or a designed intestacy.(h) It was this rule, say the revisers in their note to this provision,(i) which they proposed to change in the above section, by adopting the presumption against a revival, and excluding evidence to contradict it. It seemed to them, they added, "that the admission of parol evidence in any case to ascertain the intentions of the deceased, is contrary to the whole spirit and policy of the Statute of Wills, and is calculated to let in all the mischiefs which its salutary provisions were framed to prevent."

The provisions of the 53d section, as reported by the revisers and adopted by the legislature, it is plain, do not extend to all cases of the revocation or destruction of a second will, to affect the previous testamentary dispositions. Assuming that a second will, by its terms revoking a previous will still retained by the testator, although of itself revocable during the life of the testator absolutely from the time of its execution, defeats the previous will, and thereby if the latter should be destroyed, cancelled or revoked, raises a necessity for the revival of such previous will, in order to give it validity. A case where the second will does not, by its terms, impair the validity of the previous will, but which has been destroyed or revoked, is not within the provision of the statute. In such a case, the words of the statute that "the destruction, cancelling, or revocation of the second will, shall not *revive* the first will, unless it appear by the terms of such revocation, that it was his [the testator's] intention to *revive and give effect* to his first will," have not any application. There cannot be any occasion for the testator, on destroying or revoking a subsequent will, to manifest an intention to revive a previous will, if the validity of such previous will has not been defeated or impaired.(j)

(g) See *Wms. on Exrs.* 136, and cases cited. For a very curiously complicated case, involving the question of the relative effect of several codicils and testamentary papers, see *Hale v. Tokerlove*, 14 Jur. 817; 5 Eng. L. & Eq. 574. See, also, *Warner v. Warner*, 15 Jur. 141; 2 Eng. L. & Eq. 68. In *Re Hough's Estate*, 20 Law J. Rep. (N. S.) Chan. 422; 6 Eng. L. & Eq. 61; In *the Goods of Duedy*, 15 Jur. 1042; lb. 584; *Cleoburg v. Beckett*, 14 Beavan, 583; 11 L. & Eq. 329.

(h) *Goodright v. Glazier*, 4 Burr, 2512; Cowp. 1791; 1 Phillim. 406, 446; 2 Addam, 116. See, also, *Wms. on Exrs.* 145-6.

(i) 3 R. & or. S. (2nd ed.) Appdx. 633.

(j) The language of the statute would seem to imply, that in all cases of the execution of a second will, the presumption is, that such will revokes the first. This section of the statute was not adverted to in the decision of *Nelson v. McGuffert*, 3 Barb. Ch. Rep. 158; although it

By express Revocation.

According to the above quoted 42d section of the statute, express revocation or alteration of a will, or other testamentary instrument, cannot be effectual, unless "by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities, with which the will itself was required by law to be executed." Among the formalities prescribed for the due execution of a will, as will be remembered, it is required, that the testator at the time he subscribes or acknowledges his subscription, "shall declare the instrument, so subscribed by him, to be his last will and testament." The instrument of revocation, contemplated by the section of the statute now under consideration, is not a will, and cannot be published as such, because, in the first place, it is executed for the very opposite purpose, that of defeating a will, and, in the second place, a revocation by a subsequent will is expressly provided for, by the previous words of the section. The clause in question, providing for an express revocation, is, therefore, inoperative. The section was reported by the revisers, with a view to the adoption, by the legislature, of the provisions recommended by them, prescribing the formalities for the execution of wills, and this clause was consistent with and applicable to those provisions.^(k) The change made by the legislature in the formalities for the execution of wills, created the inconsistency.

Revocation by the Republication of a prior Will.

If a man make a will and, at a future period, republish it, such republication will revoke any will, intermediate to the original date of the prior will, and its republication.^(l) But this subject will be more conveniently discussed hereafter, when the doctrine of republication, generally, is considered.^(m)

Revocation by Burning, Tearing, Cancelling, Obliterating or Destroying.

With respect to revocations by injuries to, or destruction of the instrument, it has been held, that in order to operate a revocation of a

was cited on the argument. It does not, however, appear from the judgment of the Chancellor in that cause, that it was considered that the destruction, cancelling, or revocation of the second will, was established by the proof. Such a case is not within the present section of the statute. Where that does appear, it might, perhaps, admit of a doubt, whether instead of requiring of the party setting up the revocation, proof of a clause of revocation or of inconsistent provisions, the burden of proof, on the strict letter of the statute, would not lie on the other party to prove the absence of such clause or provisions.

The corresponding provision of the recent English statute, (1 Vict. c. 26,) enacts (sec. 22) that no will or codicil, or any part thereof, *which shall be in any manner revoked*, shall be revived otherwise than by the re-execution thereof, &c.

In *Culto v. Gilbert*, (18 Jur. 560,) A. C. duly executed his will. Subsequently, he duly executed another will, which was not found at his death, and the contents of which were unknown, save that it was headed "last will and testament;" it was held that the former will was revoked by the execution of the latter.

(k) See 3 R. & or. S. (2d ed.) Appendix, 627, 629, 631.

(l) Wms. on Exrs. 152, and cases cited.

(m) *Post*, p. 135.

will in this manner, it is not necessary that the instrument itself should be consumed or torn to pieces.⁽ⁿ⁾ Such acts on the part of the testator, as clearly evince a purpose and determination to destroy the will, and which, if not frustrated by accident, or by the interference of other persons, would inevitably accomplish the destruction of the paper, are sufficient, even though the will be not actually injured in any material part, or be but slightly burnt. But there must be an actual burning of the will to some extent, in order to effect a revocation of this nature.^(o) And whether by tearing or burning, for the purpose of revoking, there must be such an injury perpetrated, with intent to revoke *as destroys the entirety of the will*. It may then be said, that the instrument no longer exists as it was.^(p) It should be added, that if the act of destruction or cancellation be inchoate and incomplete, it will not amount to a revocation.^(q) Thus, if the testator in a moment of passion, against a legatee in his will, commence tearing the paper, but being interrupted before doing all he intended, afterwards expresses himself glad that he had not completely destroyed the paper, this is not a revocation.

The destruction of the instrument, by the direction and in the presence of the testator, or even by his own hand, will not amount to a revocation in judgment of law, unless he had at that time, sufficient capacity to understand the nature and effect of the act, and performed it, or directed it to be performed freely and voluntarily, with the intent to effect a revocation; and although the instrument is not in being, its contents having been satisfactorily shown, there is no difficulty in establishing it as a will, if it is shown to have been improperly destroyed.^(r) It is true, that a will proved to have been in existence, but not found at the death of the testator, is presumed to have been destroyed by him *animo revocandi*, with the intent of revoking it; and the above 67th section of the statute, makes provision for this case, and it is incumbent upon a party, who seeks to establish such will, to repel that presumption, and show that it was improperly destroyed.^(s)

All questions of revocation of wills, have ever been regarded in the probate courts, as questions to some degree of intention, and every fact of revocation may, in some sort, be said to be equivocal: but cancelling and obliterating, have always been considered peculiarly as equivocal acts, which in order to operate a revocation, must be done with intention to revoke. The presumption of law, *prima facie*, is, that such acts are done *animo revocandi*.^(t)

(n) *Bibb v. Thomas*, 2 W. Black. 1043.

(o) *Doe v. Harris*, 6 A. & E. 209; *S. C.*, 2 Nev. & P. 615.

(p) *Ib.* See also *Hobbs v. Knight*, 1 Curt. 768; *Wms. on Exrs.* 113, 115.

(q) *Doe v. Perkes*, 3 B. & A. 489. See accord. *In the Goods of Colberg*, 2 Curt. 832.

(r) *Trevelyan v. Trevelyan*, 1 Phillim. 153; *Idley v. Bowen*, 11 Wend. 227, 235; *Smith v. Wait*, 4 Barb. Sup. Ct. Rep. 28.

(s) *Idley v. Bowen*, *Supra*. See also *Nelson v. McGiffert*, 3 Barb. Ch. Rep. 158, 164.

(t) *Wms. on Exrs.* 120, and cases cited. The act of cancelling is, in itself, equivocal, and will be governed by the intent. The rule is, that if the testator lets the will stand until he dies, it is his will; if he does not suffer it to do so, it is not his will. It is ambulatory until his death. (4 Burr. 2514.) There must be a cancelling *animo revocandi*. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation. The statute has prescribed four [five.] If any of them are performed in the slightest manner, joined with a declared intent to revoke, it will be an effectual revocation. (2 Bl.

But this presumption may be repelled by evidence, showing that the *animus* did not exist; as if a man were to throw ink upon his will instead of sand, though it might be a complete deficiency of the instrument, it would be no revocation: or suppose a man having two wills of different dates by him, should direct the former to be cancelled, and, through mistake, the person directed should cancel the latter, such an act would be no revocation of the latter will.^(u)

In the case of *the Goods of Redding, otherwise Higgins*,^(v) the deceased in 1843, then passing by the name of Higgins, requested a friend to draw up her will, which he did, describing her as "C. Higgins," and the deceased duly executed that will, signing it, "C. Higgins." In 1845, the deceased, who had in the meantime, but without any assigned reason, dropped the name of Higgins, and assumed that of Redding, requested the same person to alter her will for her, so far as regarded her name, and accordingly the name, "Higgins," was turned into "Redding," in the body of the will and attestation clause, and the signature, "C. Higgins," was erased with a knife. This was done in the presence of the deceased, and subscribed witnesses; after which the deceased signed the will, "C. Redding," but the witnesses, though present, did not sign the will. "The circumstances of this case," says Sir H. Jenner Fust, are rather peculiar, but as it appears from the facts which have been stated, that the deceased had no intention of revoking her will, and her second signature has not been attested, probate must pass of the will as originally executed."

A codicil is *prima facie*, dependent on the will; and the destruction or mutilation of the will, is an implied revocation of the codicil. But there have been cases, where the codicil has appeared so independent of and unconnected with the will, that, under the circumstances, the codicil has been established, though the will has been held invalid. It is a question altogether of intention. Consequently, the legal presumption in this case, may be repelled, namely, by showing that the testator intended the codicil to operate, notwithstanding the revocation of the will.^(w)

Rep. 1044.) *Dan v. Brown*, 4 Cowen, 483, 490, per Woodworth, J. See, also, *Jackson ex dem. Howard v. Holloway*, 7 Johns. Rep. 394; *Jackson v. Betts*, 9 Cowen, 408; *S. C.*, 6 Wen. 173; *In the Goods of King*, 2 Robert. 403; *Clarke v. Scripps*, *Ib.* 403. The intention to revoke the will must however be apparent, and must be attended by evidence of some act which, within the terms of the statute, shall effect a revocation of the will. *In the case of the Goods of J. Fary*, (15 Jur. 1114; 9 Eng. L. & Eq. Rep. 600,) the deceased duly executed his will in 1846; in 1850 circumstances occurred which rendered this will inoperative, except as to a legacy of 100*l.*; and in December he drew a pen across the will, and wrote at the top of each sheet "cancelled," and also, at the end of the will, he wrote, "cancelled by me this 1st day of December, 1850," and it was held that no revocation had been effected, and probate was decreed.

(u) *Wms. on Exrs.* 120, and cases cited. This principle, that the effect of the obliteration, cancelling, &c., depends upon the mind with which it is done, having been pursued in all its consequences, has introduced the doctrine of dependent relative revocations, in which the act of cancelling, &c., being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, according as the relative act be efficacious or not. The cases on this doctrine are collected and explained by Mr. Justice Williams in his admirable work on Executors, pp. 121-126. See also *Ib.* 141-145.

(v) 14 Jur. 1052; 1 Eng. L. & Eq. Rep. 624; 2 Robert. 339.

(w) *Wms. on Exrs.* 126, and cases cited. See also *Hale v. Tokelove*, 14 Jur. 817; 2 Robert. Eccles. R. 318; 5 Eng. L. & Eq. 574.

It should be stated in conclusion, that the *onus* of making out that the cancellation of a will was the act of the testator himself, lies upon those who oppose the will.(x)

Of Revocation by Marriage or other Change of Circumstances, and therewith of Presumptive or other implied Revocations.

The different methods of expressly revoking a will having been now considered, it remains to treat of presumed or implied revocations.

The 42d section of the statute which has been considered, provides that no will in writing can be revoked otherwise than by another will by express revocation, or by mutilation or destruction in the manner therein prescribed, "except in the cases hereinafter mentioned." Those cases are where, subsequently to the making of the will, the testator has married and had issue, or a change has occurred in the family of the testator, or in respect to the property, or a portion of the property, devised or bequeathed.

The 43d section of the statute makes the marriage of the testator and the birth of issue, the wife or the issue surviving the testator, a revocation of the will, unless provision has been expressly made for such issue, or the will shows an intention not to provide for such issue. Marriage alone, or the birth of issue alone, is not a revocation, but where marriage and the birth of issue concur the will is revoked, although the wife alone survive, and if neither survive the will is not revoked. But a provision for the issue, or an express intention not to make such provision, prevents a revocation, although there be no provision, or an absence of intention not to provide for the wife. The statute applies only in the case of a will "disposing of the whole of the estate of the testator." It applies, however, as well to a case where the testator had children by a former wife, who are provided for in the will, as where he was without children at the time it was executed.(y) The statute prescribes the exact extent of the proof which is to rebut the presumption of revocation, that is, either provision for the issue by settlement, or in the will, or the mentioning of the issue in the will, in such way as to show an intention not to make such provision, "thereby relieving the courts from all difficulty on that embarrassing point."(z)

By the 44th section of the statute, a will executed by an unmarried woman is revoked by her subsequent marriage. It was an old and settled rule of law that if a woman made a will, and afterwards married, the marriage alone was a revocation of the will. This was not on the principle of presumption, arising from change of the condition of the testatrix, but the reason was, that as it is in the nature of a will to be ambulatory during the testatrix's life, and marriage disables her from making any other will, the instrument ceases to be any longer ambulatory, and must, consequently, be void. Therefore, the will of a *feme sole* ceased to have any operation after she became covert.(a)

(x) Wms. on Exrs. 130.

(y) See *Havens v. Vanderburgh*, 1 Denio, 27.

(z) 4 Kent Comm. 527; *Adams v. Winne*, 7 Paige, 99, per Walworth, Chan.

(a) 4 Kent Comm. 527; Wms. on Exrs. 156.

And if the wife survived her husband, although there was some conflict of opinion on the point, the weight of authority seems to have been that the will could not be deemed to have revived by the death of the husband.(b) The above provisions, declaring that the will of a married woman shall be deemed revoked by a subsequent marriage, effectually put an end to this question under that statute.(c)

But upon the reason of the thing, this section of the Revised Statutes is repealed by the act of the 7th April, 1848, for the more effectual protection of the property of married women, as amended by the act of the 11th April, 1849. The amended act provides as follows:

Sec. 3. Any married female may take, by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.(d)

Marriage, under this enactment, does not disable a female who has already made a will from making any other will. The will is still ambulatory, as before the marriage. The right and the power to make a valid will has not been changed. They remain precisely the same as if the woman had continued sole. It is submitted, therefore, that, the disability on the part of the woman to make or alter a will during coverture, no longer existing, a will executed previously to a marriage is not revoked by that event.

By the above recited 45th section of the statute, a bond, agreement or covenant to convey property devised or bequeathed by a previous will, is not to be deemed a revocation of the will, either at law or in equity; but such property is to pass by the devise or bequest, subject to the right of the purchaser to a specific performance. Whether the land with respect to which the contract has been made is to be considered as real or personal estate after the making of the agreement to sell the same, the interest of the testator therein passes to the objects of his bounty as specified in his will, in the same manner as if the agreement had not been made subject to the right of the other party to the agreement, to a specific performance of the contract upon payment of the purchase-money, according to the terms of the agreement, for the benefit of whoever may be entitled to the same under the will.(e) The rule, however, is, that a contract to sell lands is a revocation, in equity, *pro tanto* of a prior will. Still, as to the legal estate, the will remains in force; the title passes to the devisee, and he will be considered a trustee for the purchaser, and compelled to convey in fulfilment of the contract.(f)

The above sections of the statute, (46, 47 and 48,) prescribe the ef-

(b) See 4 Kent Comm. 527-8; Wms. on Exrs. 156. See, also, for a different view of the point, 3 R. & or. S. (2d ed.) Appendix, 631; Reviser's original note to sec. 51.

(c) 4 Kent. Comm. 528.

(d) S. L. 1849, 528, 2 R. S. (4th ed.) 331.

(e) See *Knight v. Weatherwax*, 7 Paige, 184.

(f) *Gaines v. Winthrop*, 2 Edw. Ch. Rep. 571, and authorities cited.

fect to be produced upon the terms of a will by a change in the situation of the testator's property, made after the execution of the will.

Under these provisions of the statute, evidence is admissible to show the situation of the testator's property at the time of making his will, and the changes which took place therein afterwards, for the purpose of enabling the court to determine, as a question of law, whether a devise of real estate was revoked, or a specific legacy was adeemed either wholly or in part, by a partial or total destruction or change of the subject matter of the devise or bequest. Parol evidence of an actual intent to revoke a devise or bequest, which revocation could not be implied by the court from a mere knowledge of the different situations of the testator's family and property at the time of making his will, and afterwards, is, however, wholly inadmissible. In other words, extrinsic evidence must be admitted to prove the *material facts* upon which the legal question of revocation depends. But if the court, after being placed in the situation of the testator, by a knowledge of all these material facts, is not authorized, as a question of legal construction, to declare that the devise or bequest was revoked or adeemed, other evidence to show the actual intention of the testator cannot be received. On the other hand, it would seem the Revised Statutes have settled the principle, which before had been left in doubt by the conflicting decisions of courts, that where the law presumes a revocation from a change in the testator's family or property, after the making of his will, parol evidence of actual intention to the contrary is not admissible to rebut that presumption.^(g)

Previous to the Revised Statutes, a devise of real estate, whether general or specific, was in the nature of an appointment of the specific estate, which the testator had at the time of making his will; but to take effect only at his death, and giving the testator the absolute control over the same in the meantime. It was, therefore, like a bequest of a specific legacy of personal estate, liable to be revoked or adeemed by a total destruction, or an entire change of the estate or property which was the subject matter of the bequest or devise. It necessarily followed from the adoption of this principle, that when the testator entirely changed the nature of the property devised, or parted with all his interest in the same subsequently to the making of his will, there was an implied revocation of the devise, even though he might afterwards have acquired a similar interest in the same property by a new purchase thereof, or otherwise. But where the subsequent disposition was of a partial interest in the subject matter of the devise merely, but leaving the residue of the estate devised still in himself, it was only a partial revocation or ademption, to the extent to which the estate was disposed of or changed, and the devise remained good as to the residue. And as there was a marked difference between real and personal estate in many respects, it also followed from the principle before mentioned, that when the testator had converted real estate, which he had devised as such into personalty, or had converted the subject of a specific bequest of personal property into real estate, there was a revocation of

(g) *Adams v. Winne*, per Chancellor Walworth, 7 Paige, 99; *Reviser's Notes*, 3 R. & or. S. (2d ed.) Appendix, 631, &c.

the will or an ademption of the bequest, so far as the nature of the property was changed. To this extent it is apprehended the legislature intended to leave the law unchanged by the above 47th section of the statute, except in the case of a mere equitable conversion of the subject of the devise, by a covenant or contract to sell the same, which case is provided for by the 45th section.

"There was another class of cases, however, in which the courts of England, by departing from the true principle of implying the revocation of a devise only in case of an actual instead of a mere constructive ademption of the subject matter of the testator's bounty, and by the adoption of arbitrary rules not founded upon any correct principles of construction, had almost uniformly defeated the actual intentions of the testator.^(h) The result of a departure from the true principle upon which the implied revocation by ademption was originally based, and of an adherence to these arbitrary rules and subtle refinements in defeating the intention of the testator by a constructive revocation of his will, is very clearly and forcibly pointed out by the revisers in their note to the 47th, 48th and 49th sections of the statute as finally adopted.⁽ⁱ⁾ There is probably no doubt, therefore, that this class of cases alone was intended to be reached by the adoption of the 47th and 48th sections, the 49th being only applicable to an unsettled question of implied revocation of an entirely different character.

"Before the passing of the Revised Statutes, it was well settled that an actual conversion of real property into personalty, as by the sale of land, and taking a bond and mortgage thereon for the purchase-money, was such an ademption or destruction of the specific property devised, as to revoke a previous will of such property as real estate. And even an equitable conversion of the real estate devised by the making of a valid agreement to sell the same, but without parting with the legal title, was deemed a revocation in equity. Both of these cases came within the general principle upon which the implied revocation of devise by ademption of the subject matter thereof was originally based. And as the legislature has altered the law as to the last only, it follows that where the testator, after the making of his will has sold a portion of the land devised, although he has taken back a bond and mortgage upon the same property for a part of the purchase-money, the will of the testator is absolutely revoked as to the land so sold.

Accordingly, in *Adams v. Winne*,^(j) where W., by his will, devised to his two sons, certain portions of his real estate, and charged them with the payment of his debts; and also devised certain other portions of his real estate to his two daughters, and then gave all the rest of his property to his four children to be equally divided between them; and after the making of his will, he sold and conveyed one of the lots he had devised to his daughters for \$3,000, and received on the sale, one-sixth of the purchase-money, and a bond and a mortgage on the lots sold for the residue; and the testator died, leaving the bond

(h) See *Cave v. Halford*, 3 Ves. jun. 662, and cases referred to.

(i) See 3 R. & Cr. S. (2d ed.) Appdx. 631.

(j) 7 Paige, 97, from the judgment of the Chancellor in which the above observations on the present subject are mainly taken. See, also, *Beck v. McGillis*, 9 Barb. S. C. R. 35; *Brown v. Brown*, 16 Ib. 56.

and mortgage uncollected. It was held that the sale of the lot, and taking back the bond and mortgage for the purchase-money, was a revocation of the devise of the lot to the two daughters, and that the bond and mortgage passed to the four children under the residuary clause in the will. But if the land devised, is reconveyed to the devisor, and the title is in him at the time of his death, the same will pass under the will without any formal republication thereof.(k)

Where the testator devised a farm to his son, in consideration of labor performed for him by his son after he became of age, which farm was of adequate value to compensate for such services, and afterwards conveyed the same farm to the son in fee; it was held that such devise was revoked by such conveyance, and that the claim of the son for his services would remain unsatisfied, unless it was agreed that the conveyance should be in lieu of the devise, and in satisfaction of that claim.(l)

Where land is devised to several persons in fee, in undivided shares, a subsequent conveyance by the devisor to one of the devisees of a part of the same land, will not revoke or be deemed a satisfaction of the devise to the grantee; but he is entitled to the land conveyed by the deed, and to a share in the land remaining under the will. And this, although it appears there was a mutual mistake as to the effect of the deed, both parties supposing the land conveyed would be in lieu of the share given to the grantee by the will.(m)

Where the testator on the same day on which he executed his will, executed an instrument purporting to be a trust deed, by which he reserved to himself a life estate in certain lands devised by the will; it was held that the provisions of the two instruments being not inconsistent, but in harmony with each other, and the grantor not having "wholly divested" himself of his interest in the property, the will was not revoked by the deed.(n) And it was suggested in that case, that there might be some doubt whether the sections of the statute referring to the revocation of "*devises and bequests*," as distinguished from those relating to the revocation of "*wills*," were not intended for the guidance and direction of courts of construction, and not for the Probate Court.

Improvements upon the land devised, made by the testator after the execution of the will, will not work a revocation; and even where the devise was in satisfaction of a debt, and both improvements were made upon the land by the erection of buildings which nearly doubled its value, and the debt was reduced after the execution of the will, during the life of the testator, it was held that there was not a revocation of the devise.(nn)

A devise of a lot which the testator has contracted in writing to purchase, and upon which he has paid a portion of the purchase-money, is not revoked by the payment of the residue of the purchase-money, and the absolute conveyance of the lot to the testator after his execution of the will. And where the heir at law in such a case had brought

(k) *Brown v. Brown*, 16 Barb. S. C. Rep. 569.

(l) *Rose v. Rose*, 7 Barb. Sup. Ct. Rep. 174.

(m) *Arthur v. Arthur*, 10 Barb. S. C. R. 9.

(n) *Vreeland v. McClelland*, 1 Brad. Surr. Rep. 393.

(nn) *Havens v. Havens, &c.*, 1 Sandf. Ch. Rep. 324.

ejectment to recover possession of the lot in question, it was held that the devisee was entitled to a perpetual injunction to restrain him from proceeding in such suit, and to a decree for a conveyance by the heir at law of his legal title, which in equity he held as a mere trustee for the devisee.(o)

Of the Republication of Wills.

The above recited 53d section of the statute which has already been partially considered,(p) provides that the destruction, cancelling, or revocation of a second will, shall not revive the prior will, unless it appear by the terms of such revocation, that it was the intention of the testator to revive and give effect to his first will, or unless, after such destruction, cancelling, or revocation, he shall duly republish his first will. The only mode in which a will which has been revoked by the execution of a second will can be revived, is that pointed out by this section of the statute. It must appear by the terms of the revocation, that it was the testator's intention to revive the prior will, or after the destruction, cancelling, or revocation, he must duly republish his first will. The previous 42d section of the statute, it will be remembered, provides that the revocation of a will must be executed with the same formalities prescribed for the execution of the will itself.(q) A revocation of a second will, which, by its terms, manifests the testator's intention to revive the first will, must, therefore, of itself, be a republication of the first will.

A codicil will amount to a republication of the will to which it refers, whether the codicil be, or be not annexed to the will,(r) or be, or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will, whether it be so described in such codicil or not; and as such, furnishes conclusive evidence of the testator's considering his will as then existing. But, although the effect of a codicil as to republication, is by no means dependent on its being annexed to the will; yet, if there are several wills of different dates, and there be a question to which of these the codicil is to be taken as a codicil, the circumstance of annexation is most powerful to show that was intended as a codicil to the will to which it is annexed, and to no other. A codicil referring inaccurately to a will, as where there is a misstatement in respect to the day of the month of the date of the will, may, nevertheless, republish it.(s)

But, although the general rule as to the republishing operation of a codicil, is as above stated; yet, in all cases of this kind, the question to be considered, is whether the particular case is, or is not, within the general rule; for, if it appears on the face of the codicil, that it was not the intention of the testator to republish, the ordinary presumption

(o) *Clapper v. House*, 6 Paige, 149. But see *Plowden v. Hyde*, 16 Jur. 823; 21 Law J. Rep. (N. S.) Chanc. 196; 13 Eng. L. & Eq. 175.

(p) *Ante*, pp. 123, 126.

(q) It has been intimated at a previous page, that this provision is inoperative.

(r) *Van Cortland v. Kip*, 1 Hill, 590.

(s) *Wms. on Exra.* 175-6, and cases cited.

arising from the existence of the codicil will be counteracted.^(t) A codicil well executed, which, by its terms, republishes a will found to be deficiently executed, is a good publication of the will, and any informality in the execution of the will, is corrected by the codicil duly executed.^(u)

Of the Consequences of Republication.

It has long been a settled law, that the republication of a will is tantamount to the making of that will *de novo*; it brings down the will to the date of the republishing, and makes it *speak*, as it were, *at that time*. In short, the will so republished, is a new will.^(v)

Consequently, upon the ordinary and universal principle, that of any number of wills, the last and newest is that in force, it revokes any will of a date prior to that of the republication.^(w)

But there is a great distinction between wills and codicils in this respect; for as every codicil is, in construction of law, a part of the will; a testator by expressly referring to, and confirming the will, will not be considered as intending to set it up against a codicil or codicils revoking it in part. If a man ratifies and confirms his last will, he ratifies and confirms it with every codicil which has been added to it.^(x)

Another consequence of a republished will being considered as a new will of the date of the republication, is, that its operation is extended to subjects which have arisen between its date and republication. Thus, if a man bequeath goods which he has not, if he after do purchase the same and then republish his will, it shall be a good will and the bequest will be effectual; and so far has the doctrine that a republication gives words, used in the original will, the same force and effect as they would have had if first written at the time of the republication, been extended, that it has been considered that a bequest may extend to *any person* to whom the description is applicable at the period of republication, though not originally intended.^(y)

This consequence of republication was not so important with respect to personalty, as it was with regard to realty, before the passing of the Revised Statutes, because a will of personalty, if it contained prospective words sufficiently comprehensive, would operate on the personal estate of the testator, to which those words applied, although acquired since the making of the will, without any republication of it; whereas no real estate which the testator had not at the date of the will would pass by it, however express, comprehensive and general the

(t) Wms. on Exrs. 177. See, also, the judgment of Lord Cranworth, V. C., in *Stihwell v. Mellersh*, 20 Law J. Rep. (N. S.) Chanc. 356; 5 Eng. L. & Eq. Rep. 185.

(u) *In the Goods of Mary Ann Dicken, deceased*, 2 Robert. Ecol. Rep. 298.

(v) Wms. on Exrs. 179.

(w) Wms. on Exrs. 179, and cases cited. In *Bryan v. White*, (14 Jur. 919; 5 Eng. L. & Eq. Rep. 579), the testator died on the 25th of August, leaving two wills of the 23d and 24th of that month, of a totally different tenor; and the will of the 24th had no words of attestation, although the prior will had a full attestation clause. Upon the evidence in the case, it was held that the presumptions arising against the last will from the improbability of the two wills on two successive days, and other circumstances, were rebutted, and the will of the 24th of August, alone was established.

(x) Wms. on Exrs. 179, and cases cited.

(y) See Wms. on Exrs. 181.

words, or however manifest the intention of the testator might be. Consequently no after-purchased lands could pass, nor any lands which did not remain in the same condition from the date of the will till the death of the testator, unless there were a republication, according to the solemnities required by the act concerning wills or the Statute of Frauds; for any, the least alteration, or new modelling of the estate after the will, was an actual revocation.^(z)

But now, by statute, every will that shall be made by a testator in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise, at the time of his death.^(a)

It has already appeared^(b) with reference to this provision of the statute, that if the testator devise all his real estate at a particular place, or within a particular district of country, after-purchased lands at that place or within that district, do not pass by the will. In order to make a will in such a case apply to such lands, it must be republished.

The execution after the Revised Statutes of a codicil to a will, made before they took effect, renders the construction of the will subject to the provisions of those statutes, in the same manner as if it had then been originally made, and therefore in such a case it was held, that the statute declaring that no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise,^(c) controlled the effect and validity of certain provisions of such will.^(d)

It has already been stated,^(e) that a codicil has the effect, and independently of any intention, to bring down the will to the date of the codicil, making the will speak as of that date, unless a contrary intention be shown, in which case it will repel that effect. When it is said, however, that a codicil republishing a will or confirming a will, makes the will speak from the time of republication, that does not mean that the will is to be read in any way different from the mode in which it would have been read, if the testator had died the moment after he had executed it. Thus, it was said by Lord Cranworth, V. C., in *Stilwell v. Mellersh*:^(f) "Suppose I, by my will, say I give £500 to the present treasurer of Lincoln's Inn, and this day twelve months I republish my will, does that alter the party who is to take the legacy? That must be so, if it is to read as if I had written it over again; the "present" treasurer would be a different person. So I conceive if I had said, I devise all the estates of which I am now seised. I afterwards purchase lands, and republish my will, I confess I think the same principle applies, as governed Lord Cottenham, in *Cole v. Scott*.^(g) My will must be read in the same way, as if I had said, I give all the lands of which I, on this 24th day of March, 1851, am

(z) See *ante*, p. 132, and authorities and cases cited.

(a) 2 R. S. 57; 4th ed. 241, sec. 5; *Ante*, p. 43.

(b) *Ante*, p. 44; *Pond v. Bergh*, 10 Paige, 140.

(c) 2 R. S. 57, sec. 3; 4th ed. 241, sec. 3.

(d) *Ayers v. Meth. Ch.*, 3 Sandf. Superior Ct. Rep. 352.

(e) *Ante*, pp. 45, 136.

(f) 20 Law J. Rep. (N. S.) Chanc. 356; 5 Eng. L. & Eq. Rep. 185.

(g) 1 Hall & Tw. 477; 1 Mac. & Gor. 518; 19 Law J. Rep. (N. S.) Chanc. 63.

seised, and if I republish that in 1852, it will still be read just as it was before; it will refer only to that which is there mentioned. Now, the cases in which this question has often arisen, and with which we are familiar, are these: where a party says by his will, "I give all my lands," what does that mean? All the lands that I have power to give. When, a year afterwards, I republish that will, having intermediately purchased lands, it will apply to the after-purchased lands. It is to be read just as if I had put in those words, "all the estates which I had power to give." Therefore it seems to me that the distinction is manifest between an express date, or an express name fixed upon. You cannot alter that by saying you republish the will at a different time. You do republish it so as to make it operate from that other later time, and if there be any legal effect, that is brought to operate by what has taken place in the meantime, you have the benefit of that. But you cannot alter the meaning of the will, which you will be doing, if, by republishing the will, you are to treat the testator as having meant something by his will, different from that which he has there expressed."^(h)

Of Proving Wills.

All wills to affect lands within this state, and generally all wills disposing of personal property within this state, must be proved in the Surrogate's Court having jurisdiction, unless in those cases where jurisdiction is given to the Supreme Court, formerly the Court of Chancery, to take the proof of the will. Those cases are where the witnesses to a will duly executed, according to the laws of this state, reside without the jurisdiction of this state, or where the original will is in the possession of a court or tribunal of justice in any other country or state, whence the same cannot be obtained,⁽ⁱ⁾ or where a will of personal estate is duly executed by a person residing out of this state, according to the laws of the state or country in which the same was made.^(j) In all other cases, the proceedings for the proof of the will, are to be taken in the Surrogate's Court.

Before the Revised Statutes took effect, the jurisdiction of the Surrogates' Courts was limited to the probate of wills of personal property. Where any real estate was devised by last will and testament, the executors to such will, or any person interested in the estate, might cause the said will to be brought before the Supreme Court, or the Court of Common Pleas of the county in which such real estate was situated, and the proof might there be taken and the will and proof recorded, and a will, duly certified by the clerk of the court in which the proof was taken to have been so proved, or the record, or a duly certified transcript of the record of such will and proof, were as effectual in all cases as the original will was, if produced and proved.^(k) But now, under the Revised Statutes, the Surrogates' Courts have jurisdiction to

^(h) See, also, the judgment of Lord Mansfield, in *Heylin v. Heylin*, Cowper, 132.

⁽ⁱ⁾ 2 R. S. 67; 4th ed. 252, sec. 77, (sec. 63.)

^(j) 2 R. S. 67, 4th ed. 253, sec. 82, (sec. 68.)

^(k) 1 R. L. 1813, 365, sec. 7.

take the proofs of wills of real as well as personal estate, as has heretofore appeared,^(l) and there is not any other court which has jurisdiction to take the proof of a will, except in the particular cases above specified.

The proving and recording of wills of real estate, have become of greater importance to devisees since the Revised Statutes than formerly. The fifth title of the first chapter of the second part of the Revised Statutes,^(m) enacts as follows:

Sec. 3. The title of a purchaser in good faith, and for a valuable consideration, from the heirs at law of any person who shall have died seised of real estate, shall not be defeated or impaired by virtue of any devise made by such person of the real estate so purchased, unless the will or codicil containing such devise shall have been duly proved as a will of real estate, and recorded in the office of the surrogate having jurisdiction, or of the register of the Court of Chancery, [now the Supreme Court,] where the jurisdiction shall belong to that court, within four years after the death of the testator: except,

1. Where the devisee shall have been within the age of twenty-one years, or insane, or imprisoned, or a married woman, or out of the state at the time of the death of such testator; or,

2. Where it shall appear that the will or codicil containing such devise shall have been concealed by the heirs of such testator, or some one of them.

In which several cases, the limitation contained in this section shall not commence until after the expiration of one year from the time when such disability shall have been removed, or such will or codicil shall have been delivered to the devisee or his representative, or to the proper surrogate.

Of the Surrogate's Court having Jurisdiction to take the Proof of the Will.

The act of the legislature of the sixteenth of May, 1837, "concerning the proof of wills," &c., provides as follows:

Sec. 1. The surrogate [or county judge, &c.,] shall have jurisdiction, exclusive of every other surrogate, within the county for which he may be appointed, [elected,] to take the proof of last wills and testaments of all deceased persons, in the following cases:

1. Where the testator, at or immediately previous to his death, was an inhabitant of the county of such surrogate, in whatever place such death may have happened;

2. Where the testator, not being an inhabitant of this state, shall die in the county of such surrogate, leaving assets therein;

3. Where the testator, not being an inhabitant of this state, shall die out of the state, leaving assets in the county of such surrogate;

4. Where a testator, not being an inhabitant of this state, shall die out of the state, not leaving assets therein; but assets of such testator shall thereafter come into the county of such surrogate;

(l) *Ante*, p. 19; 2 R. S. 220; 4th ed. 418, sec. 1.

(m) 1 R. S. 748; 4th ed. Vol. II, 155.

5. Where no surrogate has gained jurisdiction under either of the preceding clauses, and any real estate devised by the testator shall be situated in the county of such surrogate.⁽ⁿ⁾

The Revised Statutes, as has been seen,^(o) provide that every surrogate, duly qualified, shall have power also to take the proof of any will relating to real estate, situated within the county of such surrogate, when the testator, in such will, shall have died out of this state, not being an inhabitant thereof, and not leaving any assets therein.

The case of a person, not an inhabitant of this state, dying in the county of the surrogate, not leaving assets therein but leaving assets in another county, and that of a person, not an inhabitant, dying in the county, not leaving assets therein but assets coming into the county after his death, are both unprovided for in terms by the above section of the statute; though if a non-inhabitant die out of this state under these circumstances, the proving of his will is regulated. The statute declaring the general powers of the surrogate, it will be remembered, authorizes him "to take the proof of wills of real and personal estate, in the cases prescribed by law;" and further enacts, that his powers "shall be exercised, in the cases, and in the manner prescribed by the statutes of this state."^(p) It has been considered, with reference to the similar cases to those above specified alike unprovided for, in respect to the granting of administration, that there cannot, in the nature of things, be any reason why the administration of the assets of a non-inhabitant dying in the county, should not belong to the surrogate as well as that of a non-inhabitant dying out of the state, and that the argument for the power in the former instance, is stronger than in the latter;^(q) and it would seem, notwithstanding the restrictive clauses of the statute above quoted, that provided the fact be established, that assets of the deceased have come into the county since his death, or were here at that time, the surrogate has jurisdiction.

A will of personalty, valid according to the law of the domicile of the testator, but not valid according to the law of the place where it was made, may be proved before the surrogate, under a commission issued for the examination of foreign witnesses.^(r) There is in the Surrogate's Court, both jurisdiction to take the proof and the means of taking it.^(s)

The Surrogate's Court proceeds in all matters relating to the probate of wills, and the administration of the estates of deceased persons, according to the course of common and ecclesiastical law, as modified by statutory regulations. Where jurisdiction is given by statute, the mode of exercising it in cases not specially provided for, must be regulated by the court in the exercise of a sound discretion, according to circumstances.^(t)

(n) S. L. 1837, 524; 2 R. S. (4th ed.) 418, sec. 2.

(o) *Ante*, p. 19; 2 R. S. 220; 4th ed. 418, sec. 1.

(p) 2 R. S. 220; 4th ed. 518, sec. 1. See *Ante*, p. 19.

(q) *Kohler v. Knapp*, 1 Bradf. Surr. Rep. 241.

(r) See sec. 77, S. L. 1837, 537; 2 R. S. (4th ed.) 420, sec. 11.

(s) *Isham v. Gibbons*, 1 Bradf. Surr. Rep. 69, 79.

(t) *Campbell v. Logan*, 2 Bradf. Surr. Rep. 90.

Of the Proving of Wills of Inhabitants of the County—Of the Preliminary Proceedings.

It is proposed, in the first place, to consider the proving of wills, under the first subdivision of the above section of the statute, namely, the proving of the wills of persons who, at or immediately previous to their deaths, were inhabitants of the county of the surrogate. This subdivision, it is manifest, embraces by far the greatest portion of the wills brought before the surrogate. The preliminary proceedings are alike in all such cases, whether the will relate either to real or to personal estate, or to both.

The following sections of the statutes prescribe such preliminary proceedings. They are general in their terms, and in respect to real estate, extend to all cases within the jurisdiction of the surrogate, of whatever place the deceased may have been an inhabitant, except where the Supreme Court has jurisdiction to take the proof of the will, as above specified.

Sec. 4. The executor, devisee or legatee, named in any last will, or any person interested in the estate, may have such will proved before the proper surrogate.^(u)

Sec. 5. On application to the surrogate, he shall ascertain, by satisfactory evidence, the following facts:

1. If the will relate exclusively to real estate, the names and places of residence of the heirs of the testator, or that upon diligent inquiry the same cannot be ascertained;

2. If the will relate exclusively to personal estate, the names and places of residence of the widow and next of kin of the testator, or that upon diligent inquiry the same cannot be ascertained;

3. If the will relate to both real and personal estate, the names and places of residence of the heirs, widow and next of kin of the testator, or that, upon diligent inquiry, the same cannot be ascertained.

Sec. 6. The surrogate shall also ascertain whether any and which of the persons mentioned in the preceding section are minors, and the names and places of residence of their general guardians, if they have any; and if there shall be no general guardian within this state, the surrogate shall, by an order to be entered, appoint a special guardian for such minor, to take care of his interest in the premises; and the written consent of every person so appointed special guardian to serve as such, shall be filed with the surrogate. The testamentary guardian named in the will to be proved, shall not for this purpose be deemed a general guardian.^(v)

Sec. 7. The surrogate shall thereupon issue a citation, requiring the proper persons, at such time and place as shall be therein mentioned, to appear and attend the probate of the will. The citation shall state who has applied for the proof of the will, and whether it relate exclusively to either real or personal estate, or to both real and personal estate. It shall be directed to the proper persons by name, stating their places of residence; or if any of them are minors, to their guardians, by name, stating their places of residence. If the name or place

^(u) S. L. 1837, 524; 2 R. S. (4th ed.) p. 248.

^(v) S. L. 1837, 525; 2 R. S. 66, sec. 49; 4th ed. p. 248.

of residence of any person who ought to be cited, cannot be ascertained, such fact shall be stated in the citation.

Sec. 8. The citation shall be served on the persons to whom it is directed, as follows:

1. On such as reside in the same county with the surrogate, or an adjoining county, by delivering a copy to such person at least eight days before the day appointed for taking the proof; or by leaving a copy at least eight days as aforesaid, at the dwelling-house or other place of residence of such person, with some individual of suitable age and discretion, and under such circumstances as shall induce a reasonable presumption in the mind of the surrogate, that the copy came to the hands or knowledge of the person to be served with it in time for him to attend the probate of the will;

2. On such as reside in any other county in this state, by delivering a copy personally to such person, or leaving it at his dwelling-house or other place of residence, in the manner and under the circumstances above mentioned, at least fifteen days before the day appointed for taking the proof;

3. On such persons as do not reside in this state, citations may be served by delivering a copy personally to such persons, or leaving it at his or her dwelling-house or other place of residence, not less than fifteen days, nor more than ninety days before the day appointed for taking proof of any will; and on such persons as do not reside in this state, or whose places of residence cannot be ascertained, by publishing a copy of the citation in the state paper for six weeks previous to the day appointed for taking the proof.^(w)

Sec. 9: Before proceeding to take the proof of any will, the surrogate shall require satisfactory evidence, by affidavit, of the service of the citation, in the mode prescribed by law. If it has not been duly served on all the persons who ought to receive notice, the surrogate may adjourn the proceeding, and issue a further citation for the purpose of bringing in such persons.^(x)

(w) S. L. 1837, 525; S. L. 1840, 325; 2 R. S. 66; 4th ed. 248-9.

(x) S. L. 1837, 526; 2 R. S. (4th ed.) 249. Previous to the law of 1837, the preliminary proceedings on proving wills of real estate were prescribed by the following provisions of the Revised Statutes:

Sec. 7. When any real estate shall be devised by will, any executor or devisee named therein, and any person interested in such estate, may have such will proved before the surrogate of the county to whom the probate of the will of the testator would belong. In respect to personal property, under the second article of this title; and if there be no such surrogate, then before the surrogate of any county in which any real estate devised by such will shall be situated.

Sec. 8. The person intending to apply for the proof of such will, shall give notice of his intention to the heirs of the testator, as follows:

1. To such heirs as reside in the county where such proof is intended to be taken, by serving such notice personally, at least fifteen days previous to such application;

2. To such heirs as do not reside in the county, but reside in the state, by serving the same personally twenty days previously;

3. To such heirs as cannot be found in the state, and to such as do not reside therein, by serving such notice personally, twenty days previously, or by publishing it once in each week, for six weeks, in the state paper.

Sec. 9. If any of such heirs shall be minors, and have guardians, service of such notice shall be made upon such guardians, in the same manner as prescribed in the last preceding section. If they shall have no guardians, the surrogate shall appoint guardians to take care of their interests in the premises. See 2 R. S. (2d. ed.) 57.

These provisions were repealed by the 71st section of the law of 1837. See S. L. 1837,

Of the Petition for the Proof.

The above sections of the statute, numbered 5 and 6, plainly contemplate an examination before the surrogate to enable him to ascertain the facts therein designated; but the uniform practice has been for the executor, or other person, to commence the proceeding for the proof of the will, by presenting to the surrogate a written petition under oath, drawn in the form now to be described, and embodying the facts spoken of in these sections; and no other evidence as to those facts has been deemed necessary. This course of proceeding, although probably not in strict accordance with the intentions of the legislature in enacting these sections, will be found substantially to comply with their requirements. It is now well settled, and is therefore adopted in this work.

The petition must allege the death of the deceased and the time thereof, and that he was at or immediately previous to his death an inhabitant of the county. It must state the making of the will, and whether the same relates to real or personal estate, or to both. If it relate to real estate, the competency of the deceased to devise real estate may properly be averred. All the facts directed by the above 5th and 6th sections to be ascertained must then be set forth.

The heirs and next of kin referred to, are those persons to whom the real estate of the deceased would have descended, or who would have been entitled to share in the distribution of his personal property, if he had died intestate. The heirs are determined by the Statute of Descents, (1 R. S. 750;)(y) the next of kin by the Statute of Distribution, (2 R. S. 96.)(z) The heirs and next of kin are usually the same persons. The question, who constitute the next of kin, will be found particularly discussed in that part of this work where the distribution of the personal property, in cases of intestacy, is considered.(z) If one of the heirs, or next of kin, or the widow, has died subsequently to the death of the decedent, that fact should be stated in the petition, and the proper representatives of such deceased heir, or next of kin, or widow, as to his or her real or personal estate, should be mentioned, and made parties to the proceeding. In setting forth the heirs and next of kin, the manner and degree of their relationship to the deceased should be given, as well as their names. If the deceased left children, and descendants of deceased children, the names of the former should be first recited, designating them as such, and then the names of the descendants of a deceased child, describing them as descendants of such child, giving his or her name; and so with brothers and sisters, and children of deceased brothers and sisters, or any other relatives, entitled in distribution in cases of intestacy. This is the form an examination before the surrogate would properly take, and it is useful, also, as showing more

536. But this recital of them is necessary, in order to render intelligible some of the subsequent provisions relating to the present subject.

(y) By the principal provision of the Statute of Descents, the real estate of every person who shall die without devising the same, shall descend in manner following: 1. To his lineal descendants; 2. To his father; 3. To his mother; and 4. To his collateral relatives: subject, in all cases, to the rules and regulations thereafter prescribed.

(z) See *Post*, chap. 12.

distinctly the correctness of the statement. If the will relate to personal estate, the name of the widow must be given; if there be no widow that fact should be mentioned. The residences of all the persons named must be set forth. Where the name or residence of any party cannot, upon diligent inquiry, be ascertained, it should be so declared. If either of the next of kin be a married woman, the name and residence of her husband should be set forth. If any of the parties be minors, such parties should be so described, and if either of such parties have a general guardian within this state, his name and residence must be inserted. If either of the minors have no general guardian, that fact should be alleged. The prayer of the petition is, that the alleged last will and testament may be proved, and letters testamentary thereof granted according to law. (For form of petition, see Appendix, No. 1.)

As the petition is in the place of a judicial examination, and as such examination could not properly be had otherwise than under oath, the petition is required to be sworn to by the petitioner. (For form of *jurat* to the petition, see Appendix, No. 1.) The oath should doubtless be taken before the surrogate or officer performing the duties of the office of surrogate. In the county of Kings, the clerk or clerks, and in the county of New York, the assistants appointed by the surrogates of those counties respectively, in pursuance and by the authority of the several acts of the legislature, at a previous page particularly quoted and referred to, (a) are qualified to administer this oath, and the petition has been held sufficiently verified if sworn to before a commissioner of deeds, or other usual officer authorized to administer oaths.

If a married woman be executrix or legatee, devisee, or otherwise interested, so as to propound the will, it is the practice to require her husband to join with her in the petition, as the wife alone is not competent to be a party to the record.

By the above section, numbered 6, if either of the parties is a minor, having no general guardian within this state, the surrogate shall, by an order to be entered, appoint a special guardian for such minor, to take care of his interest in the premises; and the written consent of every person so appointed special guardian to serve as such, shall be filed with the surrogate. (For forms of consent and order of appointment, see Appendix, Nos. 2 and 3.) The phrase "*general guardian*," used in the section, includes guardians whether testamentary or appointed by deed, the late Court of Chancery, the Supreme Court, or the Surrogate's Court, excepting a testamentary guardian named in the will in question. In a case before the surrogate of the county of New York, a special guardian was appointed for an infant married woman. A special guardian, on proving the will, is appointed for minors residing out of the jurisdiction of this state. It is usual to appoint only a single special guardian for all the minors in any case; although it sometimes happens that the interest of some of the minor heirs, or next of kin, from being preferred by the will as devisees or legatees, may be to support the proof of the will, whilst that of others, from want of such preference, may be to oppose such proof.

(a) S. L. 1849, 235; 1 R. S. (4th ed.) 699; S. L. 1847, Vol. II, 560; S. L. 1850, 384; *Ante*, 15

Of the Issuing and Service of the Citation.

The petition having been filed, a citation issues for proving the will. The above section, numbered 7, prescribes the form of such citation. It must require "*the proper persons*" to appear and attend the probate of the will. The "*proper persons*" are, if the will relate to both real and personal estate, the widow, heirs and next of kin of the deceased; if it relate to real estate only, then the heirs alone are the persons intended; if it relate to personal estate only, then the widow and next of kin are the "*proper persons*." All the parties are named in the same citation. It must be directed to them by name, stating their places of residence. If either of the heirs or next of kin be a married woman, the practice is to direct the citation to both the husband and wife; but since the passage of the acts giving to a married woman the same right as a *feme sole* in her separate property, (b) if the decedent has died since the enactment of those statutes, there seems to be no necessity for citing the husband. (bb) If any of the parties be minors, the citation runs to their guardians, whose residences must be stated. If the minor have a general guardian in this state, the citation must be directed to him. Where the infant next of kin had a general guardian in this state, who was interested under the will against the infants, and the surrogate issued the citation directed to such general guardian, and did not appoint a special guardian, it was held that his proceedings were regular. The surrogate neither had, nor could have, any knowledge of any supposed hostile interest to the infants, growing out of the provisions of the will which he had not yet seen. Even if he had known all the facts as they subsequently appeared, he had no right, it was considered, to supersede the statute, if he found it defective, or to disobey its injunctions, because it made no provision for a case of hostile interests like that of the guardian and the infants. "If any real injury," it was said, "had been done to the interests of the infants, by the guardian's neglect, he would be responsible to the infants. But the surrogate, who pursued the exact directions of the statute, and when he could not know of the objections to that course, did not lose his jurisdiction by obeying the statute. He could not have removed the guardian without a proceeding having been instituted for that purpose, however improper that appointment may have been. He must regard him as the legal guardian, and proceed as in any other case where a general guardian has been appointed before." (c) If the minor has not any general guardian in this state, the citation runs to the special guardian who has just been appointed by the surrogate. If one of the heirs, or next of kin, or the widow, has died subsequently to the death of the decedent, the legal representatives of such person, as to his or her real or personal estate, are proper persons to be included in the citation. If the name or place of residence of any person who ought to be cited, cannot be ascertained, such fact must be stated in the citation. The name of the person applying for the proof, and the description of the estate, whether real or

(b) S. L. 1848, ch. 200; S. L. 1849, ch. 375; 2 R. S. (4th ed.) 331.

(bb) *Bleecker v. Lynch*, 1 Bradf. Surr. Rep. 468; *Keeney v. Whitmarsh*, 16 Barb. S. C. Rep. 141.

(c) *Keeney v. Whitmarsh*, 16 Barb. S. C. R. 141.

personal, to which the will relates, must be stated. It is usual to insert the date of the will in the citation, but that is unnecessary. An order must be entered for issuing the citation. (For forms of the order and citation, see Appendix, Nos. 4-5.)

The 8th section, given above, as amended by the act of 1840, prescribes the mode of service of the citation. If either of the parties be a married woman, the citation is commonly served on both herself and her husband. It was a question, previous to the acts of the 7th April, 1848, and 11th April, 1849,^(d) for the more effectual protection of the property of married women, whether the service of the citation to the heirs and next of kin, to attend the probate of a will, upon one of them, who was a *feme covert*, was a sufficient service, without a service thereof upon her husband. In *Bibby and others v. Myer*,^(e) there was a strong intimation that service upon the wife alone was sufficient. "The statute," said the Chancellor, "directs the citation to be served upon the heirs and next of kin of the testator, if they can be found. But it does not in terms require it to be served upon the husband, as well as upon the wife, where the heir and next of kin is a *feme covert*. The wife is, in fact, the real party whose rights, as heir and next of kin, the legislature intended to protect by requiring the notice of the proceedings to prove the will." In that case, where a will had been established and admitted to be recorded by the surrogate, upon service of the citation upon one of the heirs at law and next of kin, who was a married woman, without serving it upon her husband, it was held that the husband could not apply, in his own name only, to set aside the decree; but that the application must be made in the name of the husband and his wife jointly, if the proceeding upon the service of the wife only was irregular. Since the passage of the acts referred to, and where the decedent has died since the enactment of those statutes, there seems to be no doubt of the regularity of the service of the citation upon a married woman, heir, or next of kin alone.^(f) It is thought, however, to be the most prudent course to serve a citation on the husbands of *femes covert*, as well as on themselves, although it is not required by the act, either expressly or by implication.^(g) Where there are minors, the service is on the general or special guardian, as the case may be, named in the citation, and not on the minors themselves. (For forms of affidavits of service, see Appendix, No. 6.)

The statute makes provision for the service of the citation on every person named therein residing in this state, either personally or by leaving a copy at the residence of such person with an individual of suitable age and discretion, and under such circumstances as to induce a reasonable presumption in the mind of the surrogate, that the copy came to the hands or knowledge of the person intended in time for him to attend the probate. There is not any express provision for the case of a person residing in this state, but who at the time of the service is absent from his residence, either in a remote part of this state, or out of

^(d) S. L. 1848, ch. 200; S. L. 1849, ch. 375.

^(e) 10 Paige's Ch. Rep. 220.

^(f) *Bleeker v. Lynch*, 1 Bradf. Surr. Rep. 458-463; *Keeney v. Whitmarsh*, 16 Barb. S. C. Rep. 141.

^(g) Per Gridley, J., 16 Barb. S. C. Rep. 144.

this state. Indeed there is not any provision for giving the surrogate information of such a state of facts, although it may very frequently occur. The last clause of the first subdivision of the above eighth section of the statute will, however, apply to this case, and where the service is by copy, the surrogate, in order to be justified in believing that the copy came to the hands or knowledge of the person to be served with it in time for him to attend the probate, is bound to inquire where such person was at the time of such service, and if it should prove that he was absent from his place of residence in a distant part of this state, or out of this state, and that he could not or did not return or receive the copy in time to be present or to be represented at the probate, the surrogate is bound to adjourn the proceedings, and issue another citation to bring in such person.

The third subdivision of the eighth section, provides for the service of the citation on persons residing out of this state, or whose place of residence is not known. This subdivision, as it was originally enacted in 1837, was as follows: "On such persons as do not reside in this state, or whose places of residence cannot be ascertained, by publishing a copy of the citation in the state paper for six weeks previous to the day appointed for taking the proof; and by putting in the post-office, directed to such persons whose place of residence is known, at such place of residence, a copy of such citation, six weeks at least previous to such day."^(h) Under this provision the practice was plain, where the residence of the party out of this state was known, service both by publication and by mail was required. The amendment of 1840 authorizes a service of the citation on the persons named therein whose residence is known personally or by copy, out of the state, and service through the post-office is dispensed with. But whether or not it was the intention of the legislature to provide for actual service out of the state as a substitute for service through the post-office, publication for six weeks being required in either case, is perhaps not entirely clear. The practice under this subdivision has been, however, to regard the two several clauses as providing alternatives for the service of the citation in cases of non-residents, and allowing of publication alone, whether the place of residence of the non-resident is known or not known.⁽ⁱ⁾

The above section, numbered 9, provides, that before proceeding to take the proof of any will, the surrogate "*shall require satisfactory evidence, by affidavit, of the service of the citation, in the mode prescribed by law.*" This language has been considered by some imperatively to

(h) S. L. 1837, 526.

(i) The Revised Statutes, previous to the act of 1837, provided, in respect to the proof of wills of real estate, that notice of the intention to apply for the proof of the will should be given to such heirs as could not be found in the state, and to such as did not reside therein, by serving such notice personally, twenty days previously, or by publishing it once in each week, for six weeks, in the state paper, (2 R. S. 57, sec. 8;) and, in respect to wills of personal estate, that the citation should be personally served on the widow and next of kin, if they were in the county, six days, at least, before the return thereof; and if not in the county, and whenever personal service was not made on the next of kin, by publishing the same at least two weeks, in such newspaper in the state as the surrogate should deem most likely to give notice to the relatives of the deceased. (2 R. S. 60, sec. 24.) The practice, under the present statute, in respect to service of the citation on non-residents, is the same as that formerly prescribed by the Revised Statutes for service of notice in the like case for the proof of a will of real estate.

preclude any other evidence, as to the service of the citation, than that of proof by affidavit ; but the practice has been, notwithstanding, to receive admissions of service of any of the parties, in lieu of affidavits of service. Such admissions, however, must be duly proved or acknowledged. If a party appear in person, on the return day of the citation, that has been deemed sufficient in the place of an affidavit of the service of the citation upon him. The appearance of a party by an attorney at law, has also been recognized as sufficient.

On the return day of the citation, it is a proper precaution to enter the appearances of all the parties who appear in the matter, and the default of all those who have been served with the citation, or who have admitted service thereof, and fail to appear.

If the citation has not been duly served on all the persons who ought to receive notice, or their admissions of service have not been obtained, or they do not duly appear, the surrogate, under the last clause of the above 9th section of the statute, may adjourn the proceeding, and issue a further citation, for the purpose of bringing in such persons. An order must be entered for the adjournment and for the issuing of the further citation. It should contain a recital as to the appearances and defaults of parties; it should state those on whom the citation has not been served, or who have not admitted service and do not appear, and should order a further citation to issue, and the matter to stand adjourned until the return day of such further citation. (For form of the order and of the further citation, see Appendix, No. 7.)

The foregoing provisions of the statutes, and remarks relative to the issuing and return of the citation, govern the proving of nearly all wills in the Surrogate's Court, where the decedent was, at or immediately previous to his death, an inhabitant of the county ; but there are some cases to which they do not apply. Those cases are, where the party or parties alone entitled to oppose the proving of the will, shall take the proceedings before the surrogate. There is, in such cases, no one to whom to issue the citation. If the deceased has left an only son of full age, and no widow, and the son apply for the proof of the will, the surrogate, on being satisfied of those facts, will proceed forthwith to the examination of the witnesses. So, when the parties are numerous, as, for instance, a widow, heirs and next of kin, and all join in the application, he will do the same ; and even where there are minors, if the special guardian waive service of a citation, and consent to the immediate examination of witnesses, the surrogate will proceed at once to the proofs. And a party opposed to the probate of the will, may make or join in the application, so as to bring on an immediate examination of the witnesses, and an early decision in the matter.

The petition, in such cases, will be similar in almost every particular to that before described as proper in the usual case. The widowhood, or the degree of relationship, and the place or places of residence of the petitioner or petitioners, the fact that the petitioner or petitioners is or are of full age, and that there are no other heirs or next of kin of the deceased, should be distinctly averred. The prayer will be, that the surrogate forthwith proceed to take the proof of the will. If there be more than one petitioner, they must all swear to the petition. A mi-

nor, of course, cannot join in the petition, but if his special guardian be present, he may, in his discretion, for the purpose of saving time, waive service of the citation, and consent to the immediate examination of witnesses in the matter, and thus expedite the proceedings. The waiver and consent must be in writing, and must be filed with the surrogate. If the surrogate be satisfied with the evidence contained in the petition,^(j) and the special guardian, if there be one in the case, gives the required waiver and consent, he will make an order that the examination of the witnesses be forthwith entered upon. Such order should recite a summary of the facts as established by the petitioner or petitioners, and should state the appointment of the special guardian, and the filing of his waiver and consent, if such has been the case, and allow and direct the proofs to be immediately taken. The witnesses may thereupon be examined, and the other proper steps may then be taken for obtaining the probate or rejection of the will. The practice thus pointed out avoids all delay in proving the will, and may be pursued with great facility in many cases in which it has been usual to go through with the ordinary proceedings by citation. (For forms of petition and order for immediate proof, see Appendix, No. 8.)

Of Proceedings for the Proof.

The citation having been returned duly served, or with proper admissions of service, or the parties having duly appeared, or an order for immediate proof having been granted, the testimony in the matter is next to be proceeded with. The statutory direction is as follows:

Upon proof being made of the due service of the citation, the surrogate shall cause the witnesses to be examined before him. All such proofs and examinations shall be reduced to writing.^(k)

The proofs of service of the citation, the admissions of service, and their proofs, and the appearances of the parties, together with the evidence of the witnesses, must all be reduced to writing.

The following sections of the Revised Statutes make provisions with respect to witnesses, on proving wills in the Surrogate's Court.

Sec. 10. Witnesses may be summoned by subpoenas, to be issued by the surrogate, at any time before the day specified in the notice, [citation,]^(l) which may be served as in cases of personal actions; and a clause may be added to any such subpoena, commanding any person having the custody of, or power over the will, to produce the same before the said surrogate, for the purpose of being proved.

(j) The surrogate may not deem the evidence furnished by the petition sufficient. In such a case, further proof by witnesses must be presented. This remark applies to the proving of wills, as well in the usual form as in the case under consideration.

(k) S. L. 1837, 526, sec. 10; 2 R. S. (4th ed.) 249, sec. 54.

(l) This section, as contained in the Revised Statutes, is conformable to the then existing preceding sections, numbered 7, 8 and 9, prescribing the preliminary proceedings on notice on proving wills of real estate, which were repealed by the 71st section of the act of 1837. (See ante, pp. 142, 147, note; S. L. 1837, 526.) By the 18th section of the act of 1837, this section is made applicable to the present proceedings by citation, in the same manner that it formerly applied to proceedings on notice. The word citation may therefore be substituted in the section for the word notice, and the section will then become intelligible with reference to the present proceedings by citation.

Sec. 11. Disobedience to any such subpoena shall be proceeded against and punished, as in other cases of proceedings before surrogates. If any person be committed for not producing any will, he may be discharged on producing the same to the surrogate who committed him, by an order for that purpose.^(m)

Sec. 19. The witnesses shall have the like fees for their attendance on proving a will, as are allowed for similar services in personal actions, to be paid by the person applying to have such will proved.⁽ⁿ⁾

The subpoena, as has been seen,^(o) must be similar in form to those used in courts of record; and disobedience to the same, or the refusal of the witness to testify after appearing, may be punished in the same manner, and to the same extent, as in similar cases in courts of record, and by process similar in form to that used by those courts. An entry of the issuing of the subpoena must properly be made in the surrogate's minutes.^(p) (For form of entry, form of subpoena to witnesses to prove a will, and form of attachment for disobedience thereto, see Appendix, No. 9.)

The above sections, numbered 10 and 11, (2 R. S. 58,) formerly applied only to the proving of wills of real estate; but now, by the 18th section of the act of 1837,^(q) they are applicable to wills of both real and personal estate, or either, and the 10th section applies to the present proceedings by citation in the same manner that it formerly applied to proceedings on notice. The above section, numbered 19, it would seem, is now strictly applicable only to the proving of wills of real estate, but the witnesses are, without doubt, entitled to the same compensation in all cases.

For present purposes, the will is supposed to be in the possession of the party offering the same for proof, and produced before the surrogate. The case of a will in the possession of a person refusing to offer the same for probate, will hereafter be treated of.

The application for probate of a will of personal estate as has already been observed, may be made either by an executor or by any other person interested in the estate under the will; and where the executor institutes proceedings in his own name only, any other person who has an interest in establishing the will, and who would be precluded if the decision was against its validity, has an unquestionable right to intervene, and thus make himself a party to the proceeding, if he is unwilling to trust the protection of his rights to the party by whom such proceedings were instituted;^(r) and they probably have the same right to come in as interveners to protect their rights on appeal. But in either case they must come in by a petition in the proper form, and

^(m) 2 R. S. 58; 4th ed. 242.

⁽ⁿ⁾ 2 R. S. 59; 4th ed. 243, sec. 16. *Witnesses' fees.*—For each witness, fifty cents, for each day, while attending any court or officer, and if the witness resides more than three miles from the place of attendance, travelling fees at the rate of four cents per mile, going and returning. S. L. 1840, ch. 386, sec. 8; 2 R. S. (4th ed.) 831.

^(o) *Ante*, p. 22.

^(p) See 2 R. S. 222; *Ante*, p. 25.

^(q) S. L. 1837, 538.

^(r) *Law's Pr. Eccl. Courts*, 70, tit. 29; *Cockburn*, ch. 6, sec. 12; *Couset*, part 6, ch. 1, sec. 1, art. 18, p. 274. *Walsh v. Ryan*, 1 Bradf. Surr. Rep. 433.

make themselves parties to the proceedings, before they can be permitted to take any part therein.^(s)

Where the codicil to a will revoked a legacy given by the will, it was held, that though the statute does not in terms give to any person the right to appear and contest a will offered for probate, except the widow, heirs and next of kin, yet, if the legatee filed an application for the proof of the will as authorized by the act of 1837,^(t) she might be permitted to intervene, and to oppose the proof of the codicil.^(u)

In the matter of the probate of the last will and testament of James Malcolm, deceased, before the Hon. Jesse C. Smith, surrogate of the county of Kings, the will offered for probate, was contested for undue influence. A legatee under a prior will, and who also had a smaller legacy under the will offered, but who was not a next of kin, claimed a right to intervene, and to oppose the probate of the will offered for probate, and it was held, that he had such an interest as entitled him so to intervene.

A person intending to oppose the proving of a will, must appear before the surrogate, either in person, or by attorney, proctor or counsel, on the return day of the citation, or in a case where it has not been necessary to issue a citation, on the day fixed for taking the proofs.

Of taking the Testimony.

The parties and witnesses being now before the surrogate, the examination commences.

Where a person appears before a surrogate to oppose the probate of a will, he is bound, if the adverse party dispute his interest, to propound the same, or show his right to contest the will. If issue be taken on the allegation of interest, the evidence in relation to that question, and that which relates to the validity of the will, should proceed *pari passu*. A person claiming as next of kin, whose title as such is disputed, should, in his allegation of interest, show how he was related to the deceased.^(v)

Where two instruments of a testamentary character are propounded by different parties, the several applications for probate will be consolidated and tried together.^(w) The opponent of the probate is not obliged in any stage of the proceedings to define his objections to the will, nor is there any system of allegations or pleading to control either party in his mode of carrying on the litigation. The greatest liberality prevails with respect to the topics and extent of investigation and inquiry, and the testimony is often exceedingly discursive, protracted and tedious.

(s) *Foster v. Tyler*, 7 Paige, 52.

(t) See S. L. 1837, 524, sec. 4; 2 R. S. (4th ed.) 248; *Ante*, p. 141.

(u) *Walsh v. Ryan*, 1 Bradf. Surr. Rep. 433.

(v) *The Public Administrator of New York v. Watts & Le Roy*, 1 Paige, 347.

(w) *Van Wert v. Benedict*, 1 Bradf. Surr. Rep. 114.

Of the Necessary Witnesses.

The proof which must be taken for the establishment of a will, is prescribed by the following provisions of the statutes:

Sec. 10. Two at least of the witnesses to such will, if so many are living in this state, and of sound mind, and are not disabled from age, sickness or infirmity from attending, shall be produced and examined; and the death, absence, insanity, sickness or other infirmity of any of them, shall be satisfactorily shown to the surrogate taking such proof; the surrogate shall inquire particularly into the facts and circumstances before establishing the same, or granting letters testamentary or of administration thereof.(x)

Sec. 11. In case the proof of any such will is contested, and any person having the right to contest the same shall, before probate made, file with the surrogate a request in writing that all the witnesses to such will shall be examined; then all of the witnesses to such will, who are living in this state and of sound mind, and who are not disabled from age, sickness or infirmity, from attending, shall be produced and examined; and the death, absence, insanity, sickness or other infirmity of any of them, shall be satisfactorily shown to the surrogate taking such proof.(y)

Sec. 17. No written will of real or personal estate, or both, shall be deemed proved, until the witnesses to the same, residing within this state at the time of such proof, of sound mind and competent to testify, shall have been examined pursuant to law, as above prescribed; and in all cases the oath of the person who received the will from the testator, if he can be produced, together with the oath of the person presenting the same for probate, stating the circumstances of the execution, the delivery, and the possession thereof, may be required; and before recording any will, or admitting the same to probate, the surrogate shall be satisfied of its genuineness and validity.(z)

(x) S. L. 1837, 526; 2 R. S. (4th ed.) 249, sec. 54.

(y) S. L. 1837, 526; 2 R. S. (4th ed.) 249, sec. 55.

(z) S. L. 1837, 527; 2 R. S. (4th ed.) 251, sec. 64. The 12th section of the article of the Revised Statutes, concerning "wills of real property, and the proof of them," provided as follows: "All the witnesses to such will, who are living in this state, and of sound mind, shall be produced and examined; and the death, absence, or insanity of any of them, shall be satisfactorily shown to the surrogate taking such proof." 2 R. S. 58. The statute relative to "wills of personal property, and the probate of them," contained the following enactment: Sec. 26. Written wills of personal estate offered for probate, shall be proved by one or more of the subscribing witnesses, or if they be dead, insane, or out of the state, then by proof of the handwriting of the testator, and of the subscribing witnesses. 2 R. S. 61. These provisions were repealed by the 71st section of the act of the 16th May, 1837, (S. L. 1837, 536.) and by that act, the above sections numbered 10, 11 and 17 were enacted. "While section 12, above referred to, remained in force, a devise or bequest in a will disposing of real estate, to which the devisee or legatee was a subscribing witness, could be saved by the provisions of section 50, only where the devisee or legatee should be of unsound mind, or should reside out of the state when the will was proved. This confined to very narrow limits the operation of that section as applied to wills disposing of real estate; while the different method of proving wills of personal estate under the provisions of section 26, gave effect to the 50th section, in all cases where a single disinterested witness should satisfactorily prove the due execution of the will." *Caw against Robertson*, 1 Selden, 125, per Grey, J.

The learned editor or editors of the later editions of Kent's Commentaries, seem to have overlooked the repeal of the 12th section of the Revised Statutes. In a Note at p. 565, Vol.

Sec. 20. If all the witnesses to a will shall be dead, insane, out of the state, or incompetent to testify, the surrogate may take and receive proof of the handwriting of the testator, and of the subscribing witnesses, and of such other facts and circumstances as would be proper to prove such will on a trial at law; and if such proof shall be satisfactory to the surrogate, the will may be admitted to probate, and be recorded as a will of personal estate only, and so as to affect only the personal estate of the testator.(a)

The following provision is contained in that part of the Revised Statutes declaring the proof requisite to the establishment of a will of real estate:

Sec. 13. When any one or more of the subscribing witnesses to such will shall be examined, and the other witnesses are dead or reside out of the state, or are insane, then such proof shall be taken of the handwriting of the testator, and of the witness or witnesses so dead, absent or insane, and of such other circumstances as would be sufficient to prove such will on a trial at law.(b)

The following sections of the statute make provisions regarding the competency of subscribing witnesses to a will:

Sec. 6. If by any will any real estate be charged with any debt, and the creditor whose debt is so charged, shall attest the execution thereof, such creditor, notwithstanding such charge, shall be admitted as a competent witness, to prove the execution of such will.(c)

Sec. 50. If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment, shall be void, so far only as concerns such witness or any claiming under him; and such

IV, 7th edition, that section is spoken of as still in force, and with reference to the provision of the 50th section, that the beneficial devise, legacy, or interest to a witness, is void, in case "such will cannot be proved without the testimony of such witness," it is said: "There seems to be no room for the application of this exception, if all the witnesses must be produced and examined."

"By this change of the statutes," says Mr. Justice Grey, in *Caw v. Robertson*, "I think the legislature designed to place the proof of wills of real and of personal property (as the formalities required at their execution had before been placed) on the same footing; and also to extend in regard to wills of real estate, and limit in regard to wills of personal estate, the benefits of section 50, before mentioned, to the cases where the execution of the will should not be contested; and where proof of its due execution could be made by the number of witnesses indispensable to its validity, without calling upon the witness claiming a beneficial interest under it. These things the act of 1837 accomplishes, and thus secures uniformity, not only in the proof of wills, but in the effect of provisions therein, in favor of subscribing witnesses, whether they relate to real or to personal estate, or to both; and removes the incongruity, which before existed between sections 12 and 50. It may have been one object of the change, as was suggested by the learned justice, who delivered the opinion in this cause, in the court below, (See *Robertson v. Caw*, 3 Barb. Sup. Ct. Rep. 410,) to relieve the executors or devisees having an interest in proving the will, from the labor and expense of producing all the witnesses beyond two. But I cannot think that this was the chief inducement to the repeal of section 12. The simplicity and convenience of a uniform system in the proof of wills, both of real and personal property, and the more just and equitable application of the provisions of section 50, are reasons, which, in my judgment, must have operated with much greater force in producing the change."

(a) Ib. 528; 2 R. S. (4th ed.) 251 sec. 66.

(b) 2 R. S. 58.

(c) 2 R. S. 57; 4th ed. 241.

person shall be a competent witness and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made.(d)

The above 10th section imperatively requires the testimony of at least two of the subscribing witnesses to the will, if so many are living in this state, of sound mind, and not disabled by age, sickness or infirmity from attending. Where a subscribing witness is a devisee, or legatee, or otherwise interested under the will, and there are two other subscribing witnesses who attend and are examined, and the proof is not contested, or the person opposing the proof does not request the examination of all the witnesses pursuant to the above 11th section, and the two witnesses examined prove the will to the satisfaction of the surrogate, the subscribing witness, who is a devisee or legatee, should not be called as an attesting witness.(e) Where two of the attesting witnesses are not legatees and a third is, it cannot be determined that the will can be proved, without the testimony of the legatee, until the others are examined. If the testimony of the two sworn is not clear and satisfactory, then a case arises in which the will cannot be proved *without the testimony* of the third; and then, and not before the subscribing witness, legatee or devisee may be called and examined. And it would seem that there is not, in any case where there are three or more subscribing witnesses, any necessity for examining more than two witnesses, who satisfactorily prove the will, unless the proof is contested by some one having the right to do so. The above 17th section of the statute declares that no will of real or personal estate shall be deemed proved, unless the witnesses to the same, residing within this state, competent to testify, shall have been examined, as hereinbefore provided. When two witnesses are produced and examined, as required by section 10, by whom the will is satisfactorily proved, or when the proof of the will is contested, all the witnesses living in this state, competent to testify, and not disabled, are produced and examined, as provided in section 11, then the requisites of section 17 are complied with, so far as the necessity exists for the production and examination of witnesses.(f) The above 17th section provides, also, for taking proof of the custody of the will; and in the court of the surrogate of the county of New York, such proof was formerly, in nearly all cases, required, although the statute is not peremptory on the point; but this practice has been discontinued, and now proof of custody is required only in litigated cases, and where a question as to the identity of the instrument arises. (For forms of the usual depositions proving the custody of the will according to this provision, see Appendix, No. 15.)

(For forms of depositions proving the handwriting of the testator or of a subscribing witness under the above sections, numbered 20 and 13, see Appendix, No. 16.)

Before the witness is examined, an oath is administered to him by the surrogate, that the evidence which he shall give in the matter of proving the will in dispute, shall be the truth, the whole truth, and

(d) 2 R. S. 65; 4th ed. 247.

(e) *Caw against Robertson*, 1 Selden, 125.

(f) *Caw against Robertson*, 1 Selden, 125, per Grey, J.

nothing but the truth. His testimony is committed to writing by the surrogate, and after the witness has subscribed the same, he is again sworn to the truth of his deposition.

The statute, however, does not point out any mode or form in which the testimony shall be taken before the surrogate. It will be enough if it be attested by the solemnity of an oath, with full opportunity of examination for both sides.(g)

Of the Examination of Witnesses residing in the same County, or in another County, disabled from attending.

The following sections of the statutes, (the first of which has already been inserted, in connection with the previous subject, but is here, as it will be perceived, necessarily repeated,) provide for the taking of the testimony of aged, sick or infirm witnesses:

Sec. 11. In case the proof of any will is contested, and any person having the right to contest the same, shall, before probate made, file with the surrogate, a request in writing that all the witnesses to such will, shall be examined; then all the witnesses to such will, who are living in this state and of sound mind, and who are not disabled from age, sickness or infirmity, from attending, shall be produced and examined: and the death, absence, insanity, sickness or other infirmity of any of them, shall be satisfactorily shown to the surrogate, taking such proof.(h)

Sec. 12. If any such aged, sick or infirm witness, reside in the same county with the surrogate, it shall be the duty of the surrogate, after examining the other witnesses, to proceed without unnecessary delay, to the dwelling-house or other place of residence of such witness, and there, in the presence of such persons as may choose to attend, proceed to take the examination of such witness, in the same manner, and with the like effect, as though such witness had attended and been examined before the surrogate on the return of the citation.

Sec. 13. If such aged, sick or infirm witness, reside in a different county from the surrogate, and it shall not be probable that his attendance can be procured within a reasonable time, to which the surrogate may, in his discretion, adjourn the proceeding for that purpose, the surrogate may, in such case, after having examined the other witnesses, make an order adjourning the proceeding in his court, to some future day, and directing that such aged, sick or infirm witness be examined before the surrogate of the county in which he resides, and specifying some Monday, on or before which, the said order shall be delivered to the surrogate, directed to take the examination: a copy of which order, under the seal of the surrogate making the same, together with the original will, shall be delivered to the person applying for the probate, to be transmitted to the surrogate directed to take the examination.(i)

Sec. 14. The surrogate by whom any such order and will shall be

(g) *Seguine v. Seguine*, 2 Barb. Sup. Ct. Rep. 395, per Edmonds, J.

(h) S. L. 1837, 526; 2 R. S. (4th ed.) 249, sec. 55.

(i) S. L. 1837, 527; 2 R. S. (4th ed.) 250.

received, shall, on the Monday mentioned in such order, appoint a time and place for taking such examination, and give notice thereof to any person who may attend such surrogate, for the purpose of hearing such examination; and at the time and place so appointed, or at such other time and place, as may be found necessary to designate by adjournment, the surrogate, in the presence of such persons as may choose to attend, shall proceed to take the examination of such aged, sick or infirm witness, in the same manner, and with the like effect, as though such witness had attended, and been examined before the surrogate, having original jurisdiction on the return of the citation. Such surrogate may issue subpoenas under his seal of office, to compel the attendance of any such witness or witnesses, for the purposes aforesaid, in like manner, and with the like effect, as in cases in which he has original jurisdiction.(j)

Sec. 15. Such examination shall be reduced to writing, and be subscribed by the witness; and the examination, together with a statement of the proceedings before the surrogate taking the same, shall be certified by him, under his seal of office, and be returned without delay to the surrogate who ordered such examination.

Sec. 16. Upon the deposition so returned, together with such other proofs as may have been adduced before him, the surrogate to whom the original application was made, shall, on the day to which the proceeding in his court had been adjourned, or as soon thereafter as practicable, proceed to determine on the sufficiency of the proof of any such will.(k)

By the "Act concerning the Proof of Wills," passed 22d of April, 1841,(l) sec. 1, the foregoing sections, numbered 11, 12, 13, 14, 15 and 16, are made applicable to all witnesses whom any person interested in the proof of a will, shall request to be examined—whether such witnesses be subscribing witnesses to such will or not—provided the surrogate who has the power to take the proof of such will, is satisfied that the testimony of the witness so requested to be examined is material.

By the second section of the same act, the provisions of the first section are made applicable to all cases of the proof of wills, whether the will be contested or not.

And the third section of the same act declares, that no witness shall

(j) The surrogate, for any necessary travel required by these sections, is entitled to be paid at the rate of ten cents per mile, going and returning. S. L. 1837, 536; 2 R. S. (4th ed.) 422.

The provision of the statute is as follows: "sec. 69, surrogates shall be paid the like fees, for services rendered, pursuant to this act, as they are now entitled to receive, for similar services; and for any necessary travel, required by the eighteenth and twentieth sections of this act, shall also be paid at the rate of ten cents per mile, going and returning." The 18th and 20th sections of the act, do not require any travelling by the surrogate. The above 12th and 14th sections are the only sections of the act which contain any such requirement. The 69th section probably was framed with a view to a different numbering of the sections, from that which was finally adopted, when the bill passed the legislature. In inserting this 69th section, in the 4th edition of the Revised Statutes, vol. II, p. 422, it is marked as the 68th section of the act of 1837, and a similar mistake occurs with respect to the 70th section.

(k) S. L. 1837, 527. 2 R. S. (4th ed.) 250.

(l) S. L. 1841, 105. 2 R. S. (4th ed.) 250, 251.

be examined under the provisions of the said act, unless the party requesting such examination, shall have previously given written notice of the time and place appointed for such examination, for such length of time, as is required in cases of trials of issues of fact in the Supreme Court, to all the parties who appeared before the surrogate before whom the proceedings to take the proof of any such will are pending.

The request under the above section, numbered 11, should aver the capacity in which the party claims the right to contest the will. In other respects it may follow the words of the statute.

If the contesting party, propose to have a subscribing witness examined, who is disabled by age, sickness or infirmity, from attending before the surrogate, he must prove the residence of the witness, and if he reside in another county, that it is not probable that his attendance can be procured within a reasonable time, and then, after all the other witnesses have been examined, the surrogate, if the witness reside in the same county, will proceed to his residence and take his examination; or, if he reside in another county, will direct his examination to be taken before the surrogate, of the county of his residence. Where a person, not a subscribing witness, being disabled from attending, is proposed to be examined, the contesting party, in addition to showing the residence and disability of such person, and where he resides in another county, that it is not probable that his attendance can be procured within a reasonable time, must, by the amendment of 1841, satisfy the surrogate, that the testimony of such person is material, and then, after all the other witnesses have been examined, his testimony may be taken before either the original surrogate, or the surrogate of another county, according to the residence of the witness. The residence of the witness, the improbability of his attendance, and the necessity for his examination, may appear by the testimony of the other witnesses in the matter, or may be shown by affidavit. By the amendment of 1841, the testimony of persons, whether subscribing witnesses or not, disabled from attending, may be taken, although the proof of the will be not contested. The surrogate, where there is no opposition to the proof, may of his own motion, proceed to take the testimony of a sick or disabled witness, at his residence in the same county, or where such witness resides in a different county, direct that he be examined before the surrogate of such county.

The order directing the examination of a witness before the surrogate of a different county from that to which the proof of the will belongs, should set forth the names of all the parties who have appeared in the matter, in order that the surrogate who is to take the testimony may see, before proceeding to the examination, that due notice has been given, pursuant to the 3d section above quoted of the act of 1841. It should specify some Monday on or before which it must be placed in the hands of the surrogate directed to take the examination, and a copy of the same, together with the original will, is to be delivered to the person applying for the probate, to be transmitted to the proper surrogate. The carriage of the order and will thus belongs in all cases

to the party propounding the will, although he may not be the one requesting the examination of the distant witness.

On the Monday fixed in the order, the surrogate who has received the same must appoint a time, which should not be less than fourteen days distant, and a place for taking the examination. The notice under the 3d section of the act of 1841, is one of fourteen days.^(m) It should be served personally on all the parties who attended before the original surrogate, or in such a manner, and under such circumstances, as will justify a reasonable presumption that it reached the party in time to enable him to attend the examination. If any of the parties appeared by proctor or counsel, service of the notice on such proctor or counsel would doubtless be held sufficient. The special guardian of the minors, if there be any in the case, should be served with the notice.

(For forms of request, affidavit to obtain the examination of a disabled witness, order directing the examination before another surrogate, and notice of examination, see Appendix, No. 10.)

The notice of the examination of a disabled witness before the surrogate of a different county, having been duly given on the day appointed, the examination is proceeded with. The surrogate taking the examination must reduce the testimony to writing, and forward the same, with a statement of the proceedings before him, certified under his seal of office, to the surrogate having the principal jurisdiction of the matter. The return will be merely a correct narrative of what takes place at the examination, with the usual attestation of the surrogate, under his official seal.

Of the Examination of Witnesses residing out of the State.

If a witness reside without the jurisdiction of this state, the surrogate may issue a commission to take his testimony in the same manner as by law the same may be done in any court of record.⁽ⁿ⁾ The practice on taking out a commission, will be similar, as near as may be, to that in the Supreme Court in the like proceeding.^(o)

The application for a commission on proving a will, ought not to be made until after the return of the citation; or where a citation has not

^(m) 2 R. S. 410, sec. 7. Such, at any rate, was the notice at the time of the passing of the act of 1841. The statute was as follows: Sec. 7. Written notice of trial of every issue of fact, shall, in all cases, be served at least fourteen days before the first day of the court, at which such trial shall be intended to be had. The provision of the code of procedure is as follows: Sec. 256. At any time after issue, and at least ten days before the court, either party may give notice of trial. This is, in some respects, an analogous question to that decided in *Western v. Romaine*, (1 Bradf. Surr. Rep. 37,) and upon the substantial principle of that decision, the rule of the Revised Statutes, prescribing fourteen days' notice, is still in force in the cases under consideration. 2 R. S. (4th ed.) 420, sec. 11. See *ante*, p. 6.

⁽ⁿ⁾ S. L. 1837, 537, sec. 77.

^(o) The practice on awarding a commission to take the testimony of foreign witnesses, is expressly regulated by statute, 2 R. S. 393; 4th ed. 638, *et seq.* Those provisions, as far as they are applicable to cases arising in the Surrogate's Court, are adopted in the directions here given. They distinctly prescribe the manner in which, "by law," commissions may be issued out of a court of record, and are thus exactly conformable to the words of the 77th section of the act of 1837.

been necessary, until the appearance of the parties; because, until then, it cannot be known whether any, and if any, what persons may demand to join in the commission or to propose interrogatories. It ought to be made as soon after the return day of the citation, or where there has not been any citation, as soon after the day appointed for taking the proofs, as practicable. It may happen, that the necessity for examining a foreign witness may not occur until during the progress of the investigation; but there should be no delay in making the application for the commission after the necessity for the same has become apparent, and the surrogate will not regard with favor an application for a commission which has been improperly deferred, and where the execution of the commission will postpone a decision upon the will.

In order to obtain the commission, a motion must be made before the surrogate. Prepare an affidavit stating the names of the witnesses, *(p)* and that they are material, as the party is advised by counsel and verily believes, and are without the state. *(q)* The affidavit for a commission may be made by a third person cognizant of the facts. *(r)* Ten days' notice of the motion must be given *(s)* to all the persons who have appeared on the proving of the will, and the notice must specify the names of three persons proposed as commissioners. The motion is to be brought on in the manner usual in courts of record.

The opposite party may resist the application if he can show reasonable grounds on which it should be denied, it being in the discretion of the court to grant or refuse it. *(t)* He may also object to any of the commissioners proposed, on showing sufficient cause by affidavit. *(u)*

If the motion be allowed, an order in accordance therewith for the issuing the commission must be entered, and a copy of the same must be served on the other parties.

A commission may issue at the instance of the party offering the will for probate where there is no opposition, if a subscribing witness or any witness resides out of this state, in which case plainly the proceeding on taking out the commission is *ex parte*.

(For forms of affidavit to obtain a commission, notice of motion and order for commission, see Appendix, No. 11.) The commission is to be made out in a form similar to that ordinarily in use in courts of records. (See Appendix, No. 12.)

Interrogatories must be drawn and settled conformably with the practice of the Supreme Court in such a case. These will of course vary according to the nature of the controversy upon the will. (For forms of direct interrogatories to a subscribing witness, embracing most of the usual inquiries in these examinations, see Appendix, No. 13.) They should be signed by counsel and settled before the surrogate, after the service of a copy on each of the opposing parties who have appeared in the matter, and a notice of settlement of four days, within

(p) 2 Johns. Cas. 68, 285.

(q) 1 Wend. 65, &c.

(r) 1 Cowen, 210.

(s) This is the time fixed by the statute, (2 R. S. 393, sec. 20,) in cases of application in vacation to one of the justices, or to a circuit judge for an order for a commission.

(t) 3 Johns. Cas. 137.

(u) 3 Johns. R. 250.

which four days the opposing parties must serve copies of their cross interrogatories, if they intend to propose any, with a notice of settlement before the surrogate, of at least two days for the same time. At the time specified, the parties attend before the surrogate. Either party may except to the interrogatories of the other; and the surrogate will decide on the exception. Further questions may also be proposed, and, if allowed, inserted among the interrogatories.(v) If no one attend on the opposite side, proof must be made by affidavit of service of a copy of the interrogatories and notice of presentment for allowance.

Although the mode thus pointed out for obtaining a commission out of the Surrogate's Court, for the examination of foreign witnesses, is that which is to prevail where a strict practice is required, the one usually adopted is not nearly so formal. The necessity for the examination of a foreign witness being apparent, and being suggested by either party, an order that a commission issue is commonly entered at once, the commissioner or commissioners having been agreed upon. Interrogatories are then settled by agreement, or where the parties differ, upon convenient notice before the surrogate.

The interrogatories being thus settled, the surrogate will then indorse his allowance of them, and annex them to the commission; and upon the commission he will direct the manner in which it shall be returned. This is commonly by mail, under the provision of the statute.(w) The parties, or their attorneys, may in writing agree on the manner in which a commission for the examination of witnesses may be returned; and on filing such agreement *with the clerk of the court*, (in the present case *with the surrogate*), the attorney for the party or the party suing out the same, may indorse thereon a direction according to such agreement; and such commission shall be returned accordingly.(x) The return should in all cases be addressed to the surrogate, as the original will is nearly always annexed to the commission, and that should not, after having been submitted for proof and before probate, be allowed unnecessarily to go out of the custody of the surrogate.

To the commission must be annexed a copy of section 16, article 2, title 3, chap. 7, part 3, of the Revised Statutes, which contains instructions to the commissioners for executing the commission,(y) together with such other particular directions as may be deemed proper. Printed forms of the instructions may be had at the stationers, as also entire sets of the papers. The original will, if necessary, should also be annexed, being first marked as it is referred to in the interrogatories. All the papers should then be carefully folded up and securely sealed, and transmitted to one of the commissioners by mail, or other safe conveyance.

The execution of the commission and the returning of the same, will follow the directions of the articles of the statutes above quoted, and the instructions accompanying the commission.

Sec. 30. [Sec. 22.] The commission, returns, depositions and ex-

(v) 2 R. S. 394, sec. 23; 4th ed. 639, sec. 15.

(w) Sec. 23, (sec. 15); 2 R. S. 394; 4th ed. 639, sec. 15.

(x) 2 R. S. 395; 4th ed. 640, sec. 21.

(y) 2 R. S. 394; 4th ed. 639, sec. 16.

hibits thereto annexed, shall remain on file in the office of the *clerk* (in the present case *surrogate*) to whom the same were addressed.(z) They shall at all times be open to the inspection of the parties, who shall be entitled to copies of such parts thereof as they may require, on payment of the fees allowed by law.(a)

The court will sometimes allow a second commission to issue, as where a witness died before his examination;(b) or where some of the interrogatories have not been answered.(bb)

Of the Evidence on Proving a Will.

The testimony in the matter having been concluded, the surrogate is to decide upon the sufficiency of the same for the establishment of the will. The following provision is contained in the article of the Revised Statutes entitled "of wills of real property and the proof of them."(c)

Sec. 14. If it shall appear upon the proof taken that such will was duly executed; that the testator, at the time of executing the same, was in all respects competent to devise real estate, and not under restraint; the said will, and the proofs and examinations so taken, shall be recorded in a book to be provided by the surrogate, and the record thereof shall be signed and certified by him.(d)

By the eighteenth section of the act of 1837,(e) it is declared that this fourteenth section shall be applicable to wills of both real and personal estate, or either. This, however, does not imply that it is necessary on proving a will of personal estate, that it should appear that the testator, at the time of executing the same, was in all respects competent to devise real estate. The decedent may have been an alien or an infant, and therefore incompetent to devise real estate; his will may nevertheless be valid as to personal property.

It has already appeared,(f) that two at least of the subscribing witnesses to the will, if so many are living within this state, and of sound mind, and not disabled by age, sickness, or infirmity, from attending, must be examined; and that upon the written request of any person interested in opposing the proof, all the subscribing witnesses living in this state, of sound mind, and not so disabled, must be produced and examined; that sick, disabled, or infirm witnesses may be examined at their residences, and that any other material witness, although not a

(a) According to this provision the surrogate should retain in his office the original will, where it has been proved, or partly proved, under a commission, and annexed to one; although another provision of the statute, presently to be referred to, directs that he return the will, after it has been proved, to the person delivering it, or to a devisee, or to an executor, or legatee. See 2 R. S. 66. It is presumed that the section relative to retaining the commission and exhibits is the paramount one in such a case.

(a) 2 R. S. 395.

(b) 3 Caines' Rep. 321.

(bb) 17 Johns. Rep. 343. The foregoing directions relative to the issuing of a commission are taken mostly from Mr. Burrill's valuable treatise on the Practice of the Supreme Court.

(c) Art. 1, tit. 1, chap. 6, part 2, 2 R. S. 56; 4th ed. 241.

(d) 1b. 58; 4th ed. 242.

(e) S. L. 1837, 528; 2 R. S. (4th ed.) 251, sec. 65.

(f) *Ante*, p. 152; See S. L. 1837. 2 R. S. (4th ed.)

subscribing witness, may also be so examined.(g) And there has already been occasion also to state the sections of the statute, which make an attesting witness competent, although he may happen to take an interest under the will.(h) It has further already been shown, that a will may be admitted to probate, as duly executed under the statute, even in opposition to the positive testimony of one or more of the subscribing witnesses, who, either mistakenly or corruptly, swear that the formalities required by the statute were not complied with, if, from other testimony in the case, the court or jury is satisfied that the contrary was the fact.(i) And where any of the witnesses are dead, or in such a situation that their testimony cannot be obtained, proof of their signature is received conformably with the statutory provisions which have been recited,(j) as secondary evidence of the facts to which they have attested, by subscribing the will as witnesses to the execution thereof.(k)

With respect to the proof required by the above 14th section of the statute, that the will was duly executed, it is proposed to add but a few observations to those which there has already been occasion to make on the subject, in considering the 40th section of the statute relative to "wills and testaments of real and personal property, and the proof of them,"(l) prescribing the manner and form of making wills.

A party seeking to establish a will, takes upon himself the burden of proving the concurrence of all the acts essential to the validity of such an instrument.(m) It is not enough that he proves one or two of them, but he must prove them all in succession. He must show that it is subscribed at the end thereof by the testator himself, or by some person for him, in his presence, and by his direction. He must also show that the subscription was made in the presence of each of the attesting witnesses, or acknowledged by the testator to have been so made in the presence of each of the attesting witnesses. He must also prove that the testator, at the time of the making such subscription, or at the time of acknowledging the same, declared the instrument to be his last will and testament. And in the last place, he must show that each of the attesting witnesses signed his name at the end of the will, at the request of the testator. There must be proof of each of these four separate acts, independent of each other. Evidence that the testator subscribed, and that the witnesses subscribed, is not proof that the testator signed in the presence of the witnesses. Evidence that he subscribed in the presence of the witnesses, and that they attested the instrument at his request, is not proof of its publication in conformity with the directions of the 3d subdivision of the 40th section. Neither is the evidence of its publication in conformity with the 3d subdivision, proof that it was subscribed in the presence of the witnesses, or acknowledged to each of the witnesses to have been so subscribed, so

(g) *Ante*, p. 155; See S. L. 1837; S. L. 1840; 2 R. S. (4th ed.) 249, 250.

(h) *Ante*, p.p. 153, 154; 2 R. S. 241, 247.

(i) *Lowe v. Joliffe*, 1 W. Black. Rep. 365.

(j) *Ante*, p. 153, 115.

(k) See *Sauncey v. Thorne*, 2 Barb. Ch. Rep. 60.

(l) 2 R. S. 56, 63, (4th ed.)

(m) *Chaffee v. Bap. Mis. Conv.*, 10 Paige 91, per Walworth Ch.

as to satisfy the demand of the 2d subdivision.(n) Proof of any one of these four separate acts, cannot be enlarged by implication or presumption, so as to become proof of any other of the four separate acts. The order in which these several acts are to be performed, as was before shown, is of no moment.(o) In contemplation of the statute, they are all to be done at the same time. Neither of the four acts, which, united, make a valid execution of the instrument, may be done at a different time from the rest.(p) There must be a concurrence of all to give validity to the act, and the omission of either is fatal.(q)

The requirements of the statute as to the execution and proof of wills, are the prescribed rules for the evidence pronounced by law, to be indispensably necessary to prove the disposing mind and will of the testator, and the authenticity of the testament; both of these being subjects peculiarly open to imposition, artifice, and error.(r) The rules which restrain and regulate the exercise of the right of testamentary disposition, which demand, upon the proof of a will, an accumulation of evidence unknown in any other proceeding, proceed from a profound sense of the necessity of protecting age and infirmity, and decaying mental faculties, from oppression and imposition. And when they are carefully and legibly written in the statute book, the courts have no other duty than to see them rigidly enforced. The law of evidence, in its application to the proof of the several facts, which, united, constitute a valid will, is the same as it is in its application to the proof of any other fact. The evidence may be direct and positive, or it may be circumstantial and presumptive, for the law of evidence in regard to wills, as well as in regard to deeds and documentary proof generally, must have reference to the casualties of human life, and the infirmities of human memory.

Thus, in a case where the attesting witnesses are dead, and the instrument has a perfect attestation clause, which asserts that the requisites of the statutes have been complied with, and the name of the testator at the end of the will, and the names of the witnesses to the attestation clause are proved to be in their proper handwriting, the proof would be circumstantial and presumptive, but still it would be such as would justify a court or jury, in the absence of all suspicious circumstances, to determine in favor of its due execution. In every case the clear probability must always be, that the witnesses would not have signed the attestation of due publication, had it not agreed with the fact, so that this must be the legal presumption until expressly contradicted. The mere absence of additional proof, would not negative this presumption.(s) So it is established, that where the facts essential to the valid execution of the will are stated in the attestation clause, the mere want of recollection in the witnesses, is insufficient to overthrow the presumption of due execution.(t) Nothing is said in the statute as to

(n) *Ib.* p. 8561.

(o) *Ante*, p. 61.

(p) *Doe v. Roe*, 2 Barb. S. C. R. 205; *Seguine v. Seguine*, *Ib.* 394; *Kearney v. Whitmarsh*, 16 Barb. S. C. Rep. 141.

(q) *Remsen v. Brinckerhoff*, 26 Wend. 331, per Nelson, C. J.

(r) See 26 Wend. 335.

(s) 26 Wend. 339.

(t) *Remsen v. Brinckerhoff*, 26 Wend. 332.

the necessity of each witness being able to prove that all the formalities required by law were complied with, where all the subscribing witnesses are alive, and are actually examined. And it would not be a proper construction of the statute to reject the probate of a will in such a case, upon the ground that some of the subscribing witnesses cannot, after a long period of years, recollect that all the requisites of the Statute of Wills were complied with.(u)

Again, as has appeared at a previous page,(v) where one of the witnesses, who was a lawyer, was dead, and the attestation clause was full, but the surviving witness was unable to prove a perfect compliance with the statute, it was held that the reasonable presumption was in favor of the due execution of the will. And, as was before shown,(w) it has been repeatedly decided that where one of the subscribing witnesses swears, that all the formalities required by the statute were complied with, the will may be admitted to probate, notwithstanding the other attesting witnesses may not be able to recollect the fact; and that the attestation clause, after the lapse of time, and on a want of recollection by the witnesses, affords a presumption or inference that its recitals are true.(x)

In *Peebles v. Case*,(xx) it was laid down that if the subscribing witnesses have lost all recollection of the execution, the court, if satisfied from other evidence that they did in fact witness the will, may admit it to probate; the performance of the usual formalities being inferred from the recitals of the *testatum* clause. When the subscribing witnesses corruptly deny the execution, and, *a fortiori*, when they are mistaken, the proof of the will may be supplied from other sources.

The proof of a will, it was further held in the same case, abides by the same rules of evidence as prevail in all other judicial investigations. The question for the court is, the *factum* of the instrument, and that may be proved in the very teeth of the subscribing witnesses. As to the effect, nature and character of their testimony, the subscribing witnesses stand on the same ground as other witnesses, on the subject of contradiction; and if untruth, mistake, or want of recollection be alleged, it is not only competent to prove it, but, on its being proven, and the judge being satisfied of the validity of the will, decree of probate should follow. The sections of the statute providing that, where the witnesses are dead, insane, out of the state, or incompetent to testify, proof of their signatures may be taken, are only directory, and do not forbid a resort to that class of testimony in other cases, when necessary for the ascertainment of truth. Having attained jurisdiction of the subject matter, the surrogate, where the course of procedure is not prescribed by

(u) *Jauncey v. Thorne*, 2 Barb. Ch. Rep. 52, 53. See also, *Buller v. Benson*, 1 Barb. Sup. Ct. Rep. 526.

(v) Page 116.

(w) Pages 114, 115.

(x) *Chaffee v. Bap. Mis. Convn.*, 10 Paige, 85; *Jauncey v. Thorne*, 2 Barb. Ch. Rep. 49; *Nelson v. McGiffert*, 3 Barb. Ch. Rep. 158; *Buller v. Benson*, 1 Barb. Sup. Ct. Rep. 526; *Weir v. Fitzgerald*, 2 Bradf. Surr. Rep. 42. See 19 Johns. Rep. 386; 4 Cowen, 483; 1 Wend. 406; 11 Wend. 599.

(xx) 2 Bradf. Surr. Rep. 226.

statute, must dispose of it according to the established rules of evidence.

But where the evidence of the subscribing witnesses, or even of one of them, proves the fact of a positive non-compliance with the requirements of the statute as to the execution of the will, there is no room left for the application of the law of presumptions, for there are no circumstances from which presumptions can arise. The requisite proof is not furnished, and it appears affirmatively that it does not exist, nor can the attestation clause be of any value in this emergency. An attestation clause is of value when the attesting witnesses are dead, or beyond the jurisdiction of the court, or where their memory has failed from any cause, but not when the facts which it asserts are affirmatively disproved. The theory upon which the assertions of an attestation clause are to come in aid of the proof of a will, is the presumption that reputable witnesses would not have put their names to it, unless its contents were known to be true. But this presumption is destroyed when the fact of a want of due execution is affirmatively shown.^(y)

The statute requires that it shall appear upon the proof taken, that the testator at the time of executing the will was not under restraint. The restraint which shall invalidate a will is not merely, indeed is scarcely ever, physical or bodily compulsion or control. The term comprises all kinds of undue influence, fraud or artifice, and all attempts to practice upon, or to take advantage of the want or failure of memory, the ignorance, or the weaknesses of the testator, his evil habits, passions, or propensities, or the defects, or infirmities of his faculties.

Generally speaking, where there is proof of due execution, everything else is implied till the contrary is proved; and evidence of the will having been read over to the testator, or of instructions having been given, is not necessary:^(z) for when an instrument has been executed by a competent person, it must be presumed that the party so executing, knew the contents and the effect of the instrument, and that he intended to give that effect to it.^(a) But there are some cases of peculiar circumstance, where a more rigid mode of proof is enforced.

Thus, although the rule of the Roman law that "*Qui se scripsit heredem*" could take no benefit under a will, does not prevail in the law of this state, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the court, and calls on it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased.^(b)

(y) See *Lewis v. Lewis*, 13 Barb. Sup. Ct. Rep. 31, 32.

(z) *Billinghurst v. Vickers*, 1 Phillim. 191; *Rodd v. Lewis*, 2 Cas. Temp. Lee, 176; *Goose v. Brown*, 1 Curt. 707.

(a) *Fawcett v. Jones*, 3 Phillim. 476; *Wheeler v. Alderson*, 3 Hagg. 587. Approbation will have the effect of prior instructions: *Forfar v. Heastie*, 2 Cas. Temp. Lee, 310; *Durnell v. Corfield*, 1 Robert. 56.

(b) See *Ante*, p. 118; *Croft v. Day*, 1 Curt. 784; *S. C., nomine; Dufour v. Croft*, 3 Moore, P. C. C. 136; *Durnell v. Corfield*, 1 Robert. 51; *Greville v. Tylee*, 7 E. F. Moo. 320; *Burger v.*

Where the testator is blind, it must be proved that the contents of the will were known to the deceased; for his execution, or other acknowledgment of the will, is not sufficient.(c) And the same, where from want of education, or from bodily affliction, he is unable to read.(cc)

By the civil law, a blind man could not make a testament in writing, unless it was read to him, and acknowledged by him to be his will before the witnesses.(d) This rule has not, however, prevailed in England, nor been incorporated in any of the statutes relative to wills. The object of requiring the will to be read to the blind man was doubtless to prevent fraud, the substitution of one instrument for another, and to secure evidence, beyond the mere *factum* of the will, of the knowledge of the contents of the identical will by the testator. It has not been made a formal ceremonial by the statute of the state, in any case, that the will should be read to the testator in the presence of the witnesses, though it is eminently proper so to do where the testator is blind or cannot read. The statute is satisfied by the subscription of the testator, at the end of the will, in the presence of two witnesses, or the acknowledgment of such subscription; the testamentary declaration of the testator; and the signature by the witnesses, of their names at the end of the will, at the request of the testator. These forms are necessary, but, even when satisfied by the evidence, do not always entitle the will to be admitted to proof. Something more is necessary to establish the validity of the will, in cases where, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the mere formal execution. Additional evidence is, therefore, required, that the testator's mind accompanied the will, that he knew what he was executing, and was cognizant of the provisions of the will. That is all that ought to be required in the proof of the will of a blind person.(e)

So it is an established rule, that where the capacity of the testator is doubtful at the time of execution, there must be proof of instruction, or of reading over.(f) But this rule only applies, or at least only applies with any stringency, where the instrument is inofficious, *i. e.*, not consonant to the testator's natural affections and moral duties, or where it is obtained by a party materially benefited.(g)

In determining, therefore, whether a will has been procured to be made by undue influence, it is proper to examine whether the alleged

Hill, 1 Bradf. Surr. Rep. 360; *Vreeland v. McClelland*, *Ib.* 393; *Weir v. Fitzgerald*, 2 Bradf. Surr. Rep. 42; *Crispell v. Dubois*, 4 Barb. Sup. Ct. Rep. 393; Taylor on Evidence, 108, sec. 105; Wms. on Exrs. 92, 293; *Mowry v. Silber*, 2 Bradf. Surr. Rep. 133.

(c) *Ante*, p. p. 51, 112; *Barton v. Robins*, 3 Phillim. 455, n. b.: but as to a will of lands, see *Longchamp v. Fish*, 2 New R. 415; *Weir v. Fitzgerald*, 2 Bradf. 42.

(cc) 4 Burn. E. L. 61, (8th ed.); *Barton v. Robins*, 3 Phillim. 455, n. b.

(d) Cod. Lib. 6, tit. 22, sec. 8; Inst. Lib. 2, tit. 12, sec. 3, 4; Dig. Lib. 37, tit. 3.

(e) *Weir v. Fitzgerald*, 2 Bradf. Surr. Rep. 68, 69.

(f) *Billingham v. Vickers*, 1 Phillim. 193; *Ingram v. Wyatt*, 1 Hagg. 382; *Dodge v. Meech*, 1 Hagg. 620. See *Barry v. Bullin*; *Ante*, p. 119; *Durnell v. Corfield*, 1 Robert. 51; *Burritt v. Sulliman*, 16 Barb. S. C. Rep. 198.

(g) *Brogden v. Brown*, 2 Add. 449. See, also, *Sankey v. Lilley*, 1 Curt. 401; *Harwood v. Baker*, 3 Moore P. C. C. 282; *Croft v. Day*, 1 Curt. 784; *S. C., nomine*; *Dufour v. Croft*, 3 Moore P. C. C. 136.

testamentary provisions are in harmony with the decedent's dispositions and affections. Subsequent recognitions of the will by the decedent, when in health, and in the undoubted full possession of his faculties, are material facts in its favor. And whether a condition of weakened capacity of the testator existed at the time of the execution of the will, and whether the will was made and procured by the artifice, influence, or control of others, is the subject of affirmative proof, and not of surmise and suspicion.^(h)

Although the *onus* of satisfying the court that the forms prescribed by the statute for the execution of wills were complied with, lies with the party seeking to establish the will, the fact of such compliance may be proved by other evidence, or inferred from circumstances, where the subscribing witnesses are dead, or absent, or otherwise incapacitated to give testimony, or where, from lapse of time, or otherwise they are unable to recollect whether the requisite formalities were observed at the time when they witnessed the execution of the instrument.⁽ⁱ⁾ So, in resting the probate of an instrument propounded as the last will and testament of a decedent, his heirs and next of kin have the right to introduce any testimony which will be sufficient to satisfy the surrogate that the instrument propounded was not in force, as a valid will, at the death of the testator named therein. Proof, therefore, that the will in question was revoked by a subsequent will of the testator, and that such subsequent will has been fraudulently destroyed; or that it was destroyed by the testator when his mind had become so impaired that he was incompetent to perform a testamentary act, is admissible.^(j) So where, in an action of ejectment, the plaintiff on the question of request to the attesting witnesses, offered to show by a person other than an attesting witness, that when the will was attested the testator was silent, it was held that the testimony was admissible, and that although there might have been a constructive request, the plaintiff had the right to establish the fact that there was no personal request made by the testator after a certain person came into the room, so that it should depend wholly upon the constructive request, and then to have had the question submitted to the jury.^(k) So where the capacity or condition of the testator, or the circumstances attending the execution of the will, are such as to excite the suspicion and awaken the vigilance of the court, and additional evidence is required to remove the suspicion and satisfy the court that the instrument propounded does express the true will of the deceased, it is not essential that such evidence should be furnished by the subscribing witnesses. It may be supplied *aliunde*. As subscribing witnesses, all that it is necessary they should prove, is that ceremony which they witnessed, and which the statute requires. This satisfies the statute; and the additional evidence which has been referred to as proper in certain cases, may be afforded by other persons.^(l)

(h) *Allen v. The Public Administrator*, 1 Bradf. Surr. Rep. 378.

(i) *Chaffee v. Bap. Mis. Con.* 10 Paige, 91.

(j) *Nelson v. McGiffert*, 3 Barb. Ch. Rep. 158, 164.

(k) *Rutherford v. Rutherford*, 1 Denio, 33.

(l) *Weir v. Fitzgerald*, 2 Bradf. Surr. Rep. 69.

EVIDENCE ON PROVING A WILL

urt of Construction, when the *factum* of the instrument has ususly established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate, the inquiry is not so limited; for there the intentions of the deceased, as to what shall operate as, and compose his will, are to be collected from all the circumstances of the case taken together.(m)

The surrogate's decree as to the validity of a will of personal estate being conclusive, he must determine upon questions of error or mistake, as well as of fraud or incapacity, when they relate to the *factum* of the instrument. The general rule is, that mistakes and variances between the will as prepared, and the instructions given for preparing it, can only be reformed by the Court of Probate.(n) It seems well settled, that a will cannot be set aside in equity on the ground of fraud,(o) and the rule must, of course, be more stringent in a case of alleged mistake, or dispute as to the testator's intention.(p)

Therefore, if there is an ambiguity upon the *factum* of the instrument, parol evidence may be admitted, under some circumstances, in the Court of Probate, to explain the intention of the testator. By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, as whether a particular clause shall have a particular effect; but an ambiguity as to the foundation itself of the instrument, or a particular part of it: As, whether the testator meant a particular clause to be part of the instrument, or whether it was introduced without his knowledge; whether a codicil was meant to republish a former or a subsequent will;(q) whether the residuary clause or any other passage was accidentally omitted.(qq) These are all matters of ambiguity upon the *factum* of the instrument.(r)

But it has been considered as a rule, that in order to justify the admission of parol evidence to explain an ambiguity upon the *factum* of an instrument, *the ambiguity must be upon the face of the paper*; and further, the facts alleged and to be proved must *completely* remove that ambiguity.(s) When no ambiguity whatever appears upon the face of the instrument, the court will not admit parol evidence.(t)

(m) *Greenough v. Martin*, 2 Add. 243; *Methuen v. Methuen*, 2 Phillim. 426.

(n) Story's Eq. Jur. sec. 179; *Burger v. Hill*, 1 Bradf. Surr. Rep. 372, and cases cited.

(o) See 1 Bradf. 373.

(p) Id.

(q) *Lord St. Helens v. Lady Exeter*, 3 Phillim. 461, n. g. There the testator left a will, dated 13th Dec., 1800, and a codicil, all in his own handwriting, beginning "This is a codicil to my last will and testament of the 10th Jan., 1796, and I do hereby ratify and confirm my said will." On the part of the executors, it was alleged that at the time of the execution of the codicil the deceased was at Burghley, and copied this from a form which he had procured from his solicitor, and inadvertently copied the date from a former will, which it was to be presumed had been destroyed, as it could not be found. Parol evidence was admitted to prove this allegation, and show the mistake: and the codicil was pronounced a codicil to the will of December, 1800.

(qq) *Blackwood v. Damer*, 3 Phillim. 458, n. d.; *Travers v. Miller*, 3 Add. 226; *Bayldon v. Bayldon*, 3 Add. 239; *Shadbolt v. Waugh*, 3 Hagg. 570. But see *Castell v. Tagg*, 1 Curt. 289.

(r) 3 Phillim. 479.

(s) *Fawcett v. Jones*, 3 Phillim. 434; *Draper v. Hitch*, 1 Hagg. 678; *Harrison v. Stone*, 2 Hagg. 550; *Shadbolt v. Waugh*, 3 Hagg. 570; and see *Sandford v. Vaughan*, 1 Phillim. 128.

(t) *Fawcett v. Jones*, 3 Phillim. 434. With respect to what shall be an apparent ambiguity such as to satisfy this rule, see Wms. on Exrs. 297, 8, and cases cited.

As to undue insertions or omissions in wills, it seems that if a clause is inserted in a will by mistake, parol evidence may be received for the purpose of that clause being expunged by showing it never was intended that it should form part of the will. So the court may receive parol evidence to explain a word in a will, but not to substitute one word for another.^(u) With respect to omissions, it is not competent for the Probate Court, under the statute prescribing the manner and form of executing wills, to supply omissions by inserting words in the will; but part of a will may be established and part refused probate, if incapacity, fraud or imposition, at the time of the execution of the latter part be shown. And where it is necessary to correct an error, to meet the intention of the decedent, probate may be limited as to particular assets.^(v) Thus, in *Burger v. Hill*,^(w) before the surrogate of the county of New York, the testator, by his will, gave and devised to his mother and sisters, all his real estate in equal proportions, share and share alike. He then gave and bequeathed unto Elizabeth Parker, the use and annual income of all his personal property during her life, with remainder to her daughter Florence, forever. The decedent, at the time of his death, possessed an estate consisting of his store in Greenwich street, which was leasehold property, his stock in trade and other personalty amounting altogether in value to about \$20,000, and some real estate in Williamsburgh, valued at \$3,000 or \$4,000. The will was drawn by Judge Bockes, and at the time of its preparation and execution, the following circumstances transpired. The testator informed the judge that he wished him to draw his will; and on being asked how it should be drawn, he said he wished to give Elizabeth Parker and her child his personal estate, the use of it to her for life and then to the child. He then said that he wished his real estate to go to his mother and sisters. To ascertain whether he understood the force of the terms he used, the judge inquired whether he had any real estate. He said the store where he carried on business in New York, he owned. "I understood from the decedent, that the store in New York, where he did business, would pass to his mother and sisters under the term "real estate" as used in the will, I asked him if he had any real estate. My object was to see if he understood the force of the term, "real estate" he used. He said he owned the store where he did business in New York, and I believe he said, that was real estate which he wanted to give to his mother and sisters." The surrogate decreed that the will be admitted to probate as a valid will of the real and personal estate of the testator, except as to the legacies of the testator's "personal estate" therein mentioned, to Elizabeth Parker and her child Florence, which said legacies of said "personal estate," are admitted to probate as a part of said will, except as to the leasehold lot and premises of the said testator, known as number two hundred and eight Greenwich street, in the city of New York, which premises are hereby reserved from the probate of so much of said will, as relates to said legacies of said "personal estate." "I am

(u) *In the Goods of Chapman*, 1 Robert. 4.

(v) *Burger v. Hill*, 1 Bradf. Surr. Rep. 360. See, also, *Wms. on Exrs.* §11.

(w) 1 Bradf. 360.

frank to say," observed the surrogate, in closing his opinion upon the case, "this disposition has not been arrived at without a full sense of the difficulties which entangle the subject, but I believe it to be right in itself, and in consonance with a just and liberal interpretation of the principles by which testamentary courts have been accustomed to be guided."

The proof must be clear and satisfactory that the insertion or omission was contrary to the intention, in order to require or justify the court to pronounce for the will, not in its actual state, but with such error first reformed or corrected.(x)

The statute also requires where the will relates to real estate, that it shall appear upon the proof taken, that the testator at the time of executing the same was in all respects competent to devise such estate. In general the only qualifications to render a person competent to devise real estate, in addition to those required to enable him to bequeath personal property, are that he should be a citizen of the United States and of full age. The blanks for the depositions of the attesting witnesses, formerly in ordinary use on proving a will in the court of the surrogate of the county of New York, contained a clause by which the witnesses swore in the words of the statute, that the testator was at the time of the execution of the will, in all respects competent to devise real estate. This has recently been altered, and the witnesses now swear that the testator was not in any respect incompetent to devise real estate. Neither of the forms of the testimony alluded to, it is supposed, furnishes conclusive evidence that the testator possessed the requisite qualifications implied by the language of the statute.

(For forms of depositions on proving a will embodying all the requirements of the statutes, see Appendix, Nos. 14 and 15.)

The will may be either admitted to probate and record or not, according as the surrogate may determine upon the evidence.

Of the Entries to be Made by the Surrogate in his Minutes.

Sec. 21. The surrogate shall enter in his minutes the decision which he may make concerning the sufficiency of the proof or validity of any will which may be offered for probate; and in case he shall decide against the sufficiency of the proof or the validity of any such will, he shall, without fee or charge, state the ground upon which the decision is made, if required by either party.(y)

(For form of the entry in the surrogate's minutes, where the will is established, see Appendix, No. 17.)

An order admitting the will to probate, reciting a brief summary of the proceedings, is also entered in the minutes. For form, see Appendix, No. 17.)

If the surrogate decide against the sufficiency of the proof or the validity of the will, an order must be entered rejecting the same. (For a form of such order, see Appendix, No. 21.)

(x) See Wms. on Exrs. 299.

(y) S. L. 1837, 528; 2 R. S. (4th ed.) 251, sec. 17.

The will having been established, it must be recorded. By the above section, numbered 14, the will and the proofs and examinations taken, are to be entered upon the record. The 10th section of the act of 1837, as has been seen,^(z) requires proof of the service of the citation to be taken and reduced to writing, as well as the examinations of the witnesses; and the present fourteenth section, construed with reference to that section, and the eighteenth section of the same act, was formerly held, in the court of the surrogate of the county of New York, to require that the whole should be recorded; so that all the proceedings from the issuing of the citation were made a part of the record. But now the practice is to enter upon the record, at its commencement, simply a brief summary of the preliminary proceedings, reciting the making of the requisite inquiry respecting the property to which the will relates, and respecting the names and residences, and other facts directed to be ascertained relative to the widow, heirs and next of kin, the appointment of a special guardian, if such has been the case, the issuing service and return of the citation, the appearances of the parties on the day appointed for taking the proof, and the decision of the surrogate upon the sufficiency of the proof and the validity of the will. The record then proceeds with the will, and the proofs and examinations mentioned in the above 14th section. (For form of the complete record of a will, including the surrogate's certificate required by the 14th section, see Appendix, No. 18.)

Of the Record and Probate of the Will and the Effect thereof, and of Recording the Proceedings.

The following section of the statute was originally enacted with reference to wills of real property and the proof of them.

Sec. 15. Every will so proved, shall have a certificate of such proof indorsed thereon, signed by the surrogate, and attested by his seal of office, and may be read in evidence without further proof thereof. The record of such will, made as aforesaid, and the exemplification of such record by the surrogate in whose custody the same may be, shall be received in evidence, and shall be as effectual in all cases as the original will would be if produced and proved, and may in like manner be repelled by contrary proof.^(a)

In all cases the admitting the will by the surrogate to be recorded, renders the original will, or the record of the proof thereof, *prima facie* evidence of the due execution of such will; but subject to be rebutted by contrary proof.^(b)

By the 18th section of the act of 1837,^(c) this 15th section is made applicable to wills of both real and personal estate, or either. (For form of the certificate to be annexed to the will, see Appendix, No. 19.)

^(z) *Ante*, p. 149.

^(a) 2 R. S. 58; 4th ed. 242, sec. 11.

^(b) See *Jauncey v. Thorne*, 2 Barb. Ch. Rep. 51-2.

^(c) S. L. 1837, 528; 2 R. S. (4th ed.) 251, sec. 65.

Sec. 19. When any will shall be recorded as a will of real estate, it shall not be necessary to record the same as a will of personal estate.(d)

This section simply renders it unnecessary to record a will anew, on proving it as to the personal estate, after it has been proved and recorded as a will of real estate, or on proving a will as to both real and personal estate, to record the same separately as to each. It does not, as some have been known to suppose, authorize probate of a will, merely on proving it as a will of real estate. To prove a will of real estate, it is necessary to cite the heirs only; but on proving a will of personal estate, the widow and next of kin must be cited. There are other distinctions, also, but this renders the meaning of this section sufficiently apparent.

A copy of the will, with a certificate of the correctness of the same, and that the will has been duly proved, and a further certificate setting forth the qualification of the executor and the issuing of the letters testamentary, is, in the county of New York, termed the probate. (For form of the probate, see Appendix, No. 20.)

Sec. 29. The probate of any will of personal property, taken by a surrogate having jurisdiction, shall be conclusive evidence of the validity of such will, until such probate be reversed on appeal, or revoked by the surrogate, as herein directed,(e) or the will be declared void by a competent tribunal.(f)

The probate is conclusive as to the validity of the will, except in a proceeding which has for its very object, directly or indirectly, to revoke or modify the probate. The statute has provided the means of enabling the next of kin of a testator, within a year after the probate, on filing allegations against the validity of the will or the competency of its proof, to compel the executors to prove the will anew; and, after hearing the proofs, if the surrogate decide the will to be invalid, or not sufficiently proved, he may annul and revoke the probate thereof.(g) But there is not any provision expressly authorizing the surrogate to revoke a probate in any other case. And even where a subsequent will has been discovered and proved, the jurisdiction is nowhere expressly conferred upon the surrogate to revoke the previous probate. And yet such a case may often occur after proof of the earlier will, and the parties in interest under the last will, be deprived of their rights, without notice, and without fault or negligence, unless a remedy exists beyond the express provisions of the statute. If the Surrogate's Court possessed the power to revoke, open, or alter its orders, it is self evident that the order itself cannot be set up as a bar to the exercise of an authority which pre-supposes the existence of some decree or order on which to act. The question in these cases, therefore, is whether after a will is admitted to proof, the surrogate has control over his own decree of probate. "There is nothing," says the surrogate, in *Campbell v. Logan*,(h) "in the law forbidding the exercise of such a power; (the

(d) 2 R. S. (4th ed.) 245, sec. 32.

(e) That is, after proceedings on allegations of the next of kin; as to which, see 2 R. S. 61-2; 4th ed. 244, sec. 22; *Post*, chap. 14.

(f) 2 R. S. 61; 4th ed. 244.

(g) 2 R. S. 61; 4th ed. 244.

(h) 2 Bradf. Surr. Rep. 90, 92.

power to revoke a previous probate on the discovery of a subsequent will;) but, on the contrary, there is a very fair implication in its favor in the very section which declares the probate to be conclusive evidence of the will until reversed on appeal, or revoked by the surrogate on allegations filed within a year by the next of kin, "*or the will be declared void by a competent tribunal.*" This section was proposed by the revisers as a rule of *evidence* declaratory of the existing law,⁽ⁱ⁾ and was not designed to restrict the power of the surrogate. Indeed, it distinctly recognizes the competency of *some* tribunal to declare the will void; and if that does not lie within the jurisdiction of the surrogate, I do not know where the power resides.^(j) No other court possesses jurisdiction in respect to the proof of wills of personal estate; and if the surrogate has no authority to open a decree for the purpose of correcting a mistake, or to let in the proof of a revocation, or a later will—if the moment a decree of probate is passed, the door is closed, and the act is irrevocable, notwithstanding the discovery of circumstances showing the probate to be erroneous, then it is evident that justice may be sacrificed to the forms of proceeding. This power has always been exercised in the English Ecclesiastical Courts. Wentworth says, "If there be falsehood in the proof, were it *communi forma*, that is, without witnesses, or by examination of witnesses, (that is, in solemn form,) yet it may, in the spiritual court, be *undone*, if disproof can be made, or proof of revocation of that will was once made, *or of the making of a later.*"^(k)

"I consider the power now under discussion as essential to the administration of justice, and as a necessary incident to the exclusive jurisdiction of the surrogate over the subject matter of the probate of wills. In this connection, my attention has been drawn to the authority exercised by the Chancellor, acting under the special power conferred on him by the English bankrupt law. Without any provision in the statute for that purpose, he has constantly exercised jurisdiction in recalling certificates and superseding commissions, on the principle that the power is incidental to the jurisdiction, and necessary for the ends of justice."^(l)

But the spiritual courts have always exercised this power over their own decrees; and the Surrogate's Court, though of inferior jurisdiction, being a tribunal proceeding according to the course of the common law, and recognized by the common law, proceeds in all matters relating to the probate of testaments and the administration of the estates of deceased persons, in conformity with prescription and established usage, except as modified from time to time by statutory regulations. It is true, the Revised Statutes define the jurisdiction of the surrogate, and direct its exercise "in the cases and in the manner prescribed by the statutes of the state;"^(m) but the power to take the proof of wills being given generally, the mode of its exercise in a case not provided

(i) 3 R. & S. (2d ed.) Appdx. 630.

(j) Williams on Exrs. 450, 457.

(k) Wentworth, Off. Ex. 111, 112. See 1 Hagg. 241, 645; 3 Hagg. 243; 1 Phill. 83; 3 Phill. 33, 56; 1 Add. 219, 365; 1 Curt. 691; 3 T. R. 125; 4 Serg. & Raw. 201.

(l) Eden on Bankrupt Law, 412, 431.

(m) 2 R. S. (3d ed.) p. 318, sec. 1. See *Ante* p. 19.

for by statute, must be regulated by the court in the exercise of a sound discretion according to the peculiar circumstances of each particular case. For example, there can be no doubt that a legatee or party interested in a later will, discovered after a previous will has been admitted to proof, has a right to have the last will proved and letters testamentary issued thereon. But there cannot be two last wills and two sets of letters at the same time. It is incidental, therefore, to the exercise of jurisdiction in taking probate of the last will, and the consequent grant of letters, to revoke the first probate, and the first letters testamentary.⁽ⁿ⁾

The following section of the statute is partly a repetition of what has already been quoted, with respect to the recording of the will.

Sec. 58. Each surrogate shall record in his books, to be provided by him, all wills proved before him, and all letters testamentary or of administration, and all letters appointing a collector, with all things concerning the same. The records of such wills and letters, and the transcripts thereof, duly certified by the surrogate having the custody of such records, under his seal of office, shall be evidence in all courts, so far as respects any personal estate, in the same manner as if the originals were produced and proved.^(o)

By the following section, the testimony on the proof of a will is to be reduced to writing, and recorded in all cases, whether the will be established or not.

Sec. 57. The testimony taken by any surrogate, in relation to the proof of any written or unwritten will, and in any controversy relating to the granting of letters testamentary or of administration, or the revoking of the same, shall be reduced to writing, and shall be entered by him in a proper book to be provided, and preserved as part of the books of his office; if taken by any first judge or district attorney, the same shall be filed in the office of the clerk of the county.^(p)

It may be observed, that under this provision, if the will be not established, only the testimony need be recorded. Neither the supposed will nor the preliminary proceedings are to be entered on the record. The proper record, in such case, in the court of the surrogate of the county of New York, is usually made in the book of the surrogate's daily minutes.

(n) In *Heyer v. Burger*, 1 Hoffman's Ch. Rep. 1, 11. The Assistant Vice-Chancellor, after quoting the provisions of the statutes relative to the revocation of a probate on allegations, and those regulating appeals from the decrees of surrogates on wills, (2 R. S. 62, sec. 38; Id. 66, sec. 55; Id. 67, sec. 59;) with reference to the last clause of this section, says: "From an examination of these various provisions, I am unable to fix any meaning to the clause used in the 29th section of the statute, viz.: 'Or the will be declared void by a competent tribunal,' unless it refers to cases in which executors or trustees come to establish a will, or carry it into execution, and its validity is contested." As to the exclusive or concurrent jurisdiction of surrogates in respect to wills of personal property, see same case. See, also, on the question of jurisdiction, and the effect of the proof of wills in the Surrogate's Court, as to the real and personal estate respectively. *Rogers v. Rogers*, per Savage, Ch. J., 3 Wend. 514; *Bogardus v. Clarke*, 1 Edwards' Chan. Repts. 266; 4 Paige, 623; *Matter of Atkinson's will*, 2 Paige, 216; *Matter of Hornby's will*, Ib. 430.

(o) 2 R. S. 80; 4th ed. 267. See *ante*, p. p. 41, 138.

(p) 2 R. S. 80; and see S. L. 1837, chap. 465, p. 543; 2 R. S. (4th ed.) 267.

Of the Disposal of the Will after Proof.

Sec. 54. All wills whenever proved according to law, except such as are required to be deposited, shall, after being recorded, be returned upon demand to the person who delivered the same; or in case of his death, insanity, or removal from the state, to any devisee named in such will, or to the heirs or assigns of such devisee; or if the same relate to personal estate only, to any acting executor of such will, or administrator with the will annexed, or to a legatee named therein.(q)

This section does not seem to call for any comments.

Of the Proving of the Wills of Non-Inhabitants.

The subject of the proving and recording of wills under the first subdivision of the statute, S. L. 1837, 524, sec. 1, where the testator, at or immediately previous to his death, was an inhabitant of the county of the surrogate, in whatever place such death may have happened, is thus concluded. The cases of wills of inhabitants of the county are, of course, far more numerous than those coming under the other subdivisions of the statute, and constitute the largest separate branch of business in the Surrogate's Court.

The other cases in which the surrogate has jurisdiction, are where the testator was not an inhabitant of this state, and died in the county of the surrogate, leaving assets therein; or died out of the state, leaving assets in the county of the surrogate; or died out of the state, not leaving assets therein, but assets of such testator have thereafter come into the county of the surrogate; or lastly, where no surrogate has gained jurisdiction by reason of either of these provisions, and any real estate devised by the testator is situated in the county of the surrogate.(r) It may be observed, that the jurisdiction in these cases uniformly follows the personal property, and it is only where there are no assets within this state, that the situation of real estate of the testator within the county of the surrogate can give him jurisdiction.

The surrogate has power also, as has been seen,(s) to take the proof of any will relating to real estate situated within his county, when the testator in such will, shall have died out of this state, not being an inhabitant thereof, and not leaving any assets therein.

All wills relating to real estate within this state, by whomsoever made, whether by inhabitants or non-inhabitants, in order to be recognized and recorded here as valid wills of real estate, must be executed and attested; and except in those cases in which the Court of Chancery [Supreme Court] has jurisdiction, must be proved in accordance with the provisions of the statutes cited in the preceding pages, and the directions there given. It is settled in the law of all civilized countries, that real property, as to its tenure, mode of enjoyment, transfer and descent, is to be regulated by the *lex loci rei sitæ*.(t)

(q) 2 R. S. 66; 4th ed: 251.

(r) See S. L. 1837, 524; 2 R. S. (4th ed.) 418, sec. 2; *Ante*, p. 139.

(s) *Ante*, p. 19; 2 R. S. 220; 4th ed. 418, sec. 1.

(t) 2 Kent's Comm. 429, 4 Ib. 513; Story's Conf. of Laws, 300, 358, *et seq.* *Mills v. Fogal*, 4 Edw. Ch. Rep. 559; *In the Matter of Stewart*, 11 Paige, 398. On the principle stated,

The preliminary proceedings on proving wills of non-inhabitants in the Surrogate's Court, are similar to those already described in the case of a will of an inhabitant of the county. The petition for the proof will, in nearly every particular, follow the same form prescribed for the proof of the wills of inhabitants. It should state the place of the domicile of the testator and the place of his death, and should aver jurisdiction in the surrogate, under one or the other of the last four clauses of the first section of the statute of 1837.^(u) If the will relate to real estate, only the names of the heirs of the decedent, according to the Statute of Descents, (1 R. S. p. 750,) should be given, together with the other particulars respecting them, required in the case of the will of an inhabitant. If the decedent left no heir at law, or if all his relatives or heirs were aliens, and incapable of inheriting lands within this state; that fact should be stated in the petition; so that notice of the proceedings to prove the will may be given to the attorney-general of the state. Where the will relates to personal estate, and it is proposed to take out probate of the same, if the decedent was not domiciled in this state at the time of his death, or if the will was executed out of the state, the domicile of the decedent should be particularly stated in the petition, and the names and residences of the next of kin, or the other persons entitled to the succession in case of intestacy, according to the *lex domicilii*, with the facts as to the minority of any of them, required on proving wills of inhabitants, should also be stated so far as the petitioner is able to ascertain the same. And where the alleged will has been executed in any other state or country, by a decedent who was not a citizen and inhabitant of this state, the petitioner must show by his petition, that the instrument propounded has been duly executed, as a good and valid testamentary disposition of the decedent's personal property, according to the laws of the state or country where he was domiciled, and where such alleged will was made, or it cannot be admitted to probate here.^(v) The prayer of the petition will be for a citation pursuant to the seventh section of the act of 1837.^(w)

The petition having been filed, an order for the issuing of the citation must be entered, and the citation must be made out, served and returned as in the usual case.

The suggestions and directions hereinbefore given, on proving the will of an inhabitant, where all the parties interested in opposing the proof, voluntarily join in presenting the matter before the surrogate, apply with variations to suit the circumstances of the case to the proving of a will of a non-inhabitant.

The examination of witnesses and the taking of the testimony in the matter, are to be brought on and conducted pursuant to the statutory provisions, and the directions which are to be observed in the cases of wills of inhabitants.

It has been held, that it is no objection to the proof of a will devising land in one state, that it had been declared void in the state where the testator resided. *Rice v. Jones*, 4 Call, 89. See, also, *Ives v. Allen*, 12 Verm. 589; *Bloomer v. Bloomer*, 2 Bradf. Surr. Rep. 339.

(u) See *ante*, p. 143.

(v) See 3 R. S. App. 634, sec. 63 to 69; Story's Conf. of Laws, 394, sec. 468; *In the Matter of Easton's will*, 6 Paige, 187.

(w) See *ante*, p.

With respect to personal property, the *situs* of the property, regulates jurisdiction as to the administration of the estate, which must be in the country in which possession is taken of it.(x) No will of personalty can be recognized, except such as has been or may be admitted to probate by the proper tribunals of this state.(y) If a will be made, and proved in a foreign country, disposing of personal property here, it must be proved where the assets are also.(z) As to the question what shall be considered a valid will of a non-inhabitant, it is now a clearly established rule, of the courts of both England and the United States, that the law of the state or country in which the deceased was domiciled at the time of his death, not only decides the course of distribution or succession as to personalty, but regulates the decision as to what constitutes the last will of the testator, without regard to the place either of birth or death, or the situation of the property at that time.(a)

It is deemed proper to insert in this place, the sections of the statutes authorizing the proving of wills in the Court of Chancery, [now the Supreme Court,] and the recording of wills so proved by the surrogate, and the issuing of letters thereon, and also certain sections making provisions with respect to wills of non-residents. They are as follows:

Sec. 63. A will duly executed according to the laws of this state, where the witnesses to the same reside without the jurisdiction of this state, or a duly exemplified or authenticated copy thereof, where the original will is in the possession of a court or tribunal of justice in another country or state, whence the same cannot be obtained, may be proved in the Court of Chancery, [now the Supreme Court,] upon a commission to be issued for that purpose, on application to the Chancellor.(b)

Sec. 64. Such commission may be issued upon the petition or bill of any person interested in the establishment of the said will; and such notice shall be given to the parties interested to oppose the validity thereof as the Chancellor shall direct, or such notice may be dispensed with, where, from the circumstances of the case, it shall be deemed unnecessary.

Sec. 65. If the facts necessary to establish the validity of the said

(x) *Preston v. Lord Melville*, 8 Cl. & F. 1.

(y) *Price v. Denshurst*, 4 My. & Cr. 80; *Bond v. Graham*, 1 Hare, 484; *Logan v. Fairlie* 2 Sim. & Stu. 284.

(z) *Tuxton v. Flower*, 3 P. Wms. 369. See *Isham v. Gibbons*, 1 Bradf. Surr. Rep. 69.

(a) *The Countess de Zichy Ferraris v. Lord Harford*, 3 Curt. 468, 486; *Craigie v. Lewin*, 3 Curt. 435; *In the Goods of Maravel*, 1 Hagg. 498; *Moore v. Budd*, 4 Hagg. 346; *Collier v. Rivaz*, 2 Curt. 855. A question is put in Story's Conflict of Laws, ch. 11, sec. 473, as to what will be the effect of a change of domicile after the will is made, if it was valid by the law of the place where the testator was domiciled when it was made, and not valid by the law of his domicile at the time of his death. And that eminent writer expresses his opinion that the will in such a case is void; for that it is the law of the actual domicile of the testator at the time of his death, and not the law of his domicile at the time of making his will, which is to govern. Mr Justice Williams appends "*sed quare*" to his note of this opinion of Judge Story. It is added in Story's Conflict of Laws, (sec. 473,) "If, however, the testator should afterwards return and resume his domicile, where his first will or testament was made, its original validity will revive also."

(b) 2 R. S. 67.

will, shall appear on the proof so taken, the Chancellor shall direct the said will or copy, and the proofs or examinations, to be recorded in the office of the register of that court.

Sec. 66. Every will or copy so proved shall have a certificate of such proof indorsed thereon, signed by the register, and attested by the seal of the Court of Chancery, and may then be read in evidence without further proof thereof; and every record so made, or an exemplification thereof, shall be received in evidence, and shall be as effectual in all cases as the original will would be if produced and proved, and may in like manner be repelled by contrary proof.

Sec. 67. The provisions contained in the preceding four sections shall extend to wills of personal as well as of real property, and to wills already executed as well as to such as shall be hereafter executed; and where there shall be assets of the testator within this state, and due notice shall have been given to the parties interested to oppose the will, the Chancellor may, by decree, establish the same as a will of personal estate; and in such case shall transmit such decree to be recorded in the office of the surrogate having jurisdiction, with directions to such surrogate to issue letters testamentary or of administration with the will annexed thereon, in the same manner as upon wills duly proved before him.

Sec. 68. Wills of personal estate duly executed by persons residing out of this state, according to the laws of the state or country in which the same were made, may be proved under a commission to be issued by the Chancellor; and when so proved may be established and transmitted to the surrogate having jurisdiction, as provided in the last preceding section; and where a will so executed shall have been duly admitted to probate in such state or country, letters testamentary or of administration with the will annexed, may also be issued thereon by the surrogate having jurisdiction, upon the production of a duly exemplified or authenticated copy of such will, under the seal of the court in which the same shall have been proved.

Sec. 69. But no will of personal estate, made out of this state by a person not being a citizen of this state, shall be admitted to probate under either of the preceding provisions, unless such will shall have been executed according to the laws of the state or country in which the same was made.

By the second section of the act of the 14th May, 1840, where a will of personal estate duly executed in this state, by a person not a resident of this state, shall in the first instance have been duly admitted to probate in a court of a foreign state or country, letters testamentary or of administration with the will annexed, may be issued thereon by any surrogate having jurisdiction, upon the production of a duly exemplified or authenticated copy of such will, under the seal of the court in which the same shall have been proved.^(c) The language of this provision in enabling the surrogate to issue letters testamentary, or of administration, is equivalent to an authority to admit the will to probate.

The 77th section of the act of 1837 provides, as has been seen,^(d)

(c) S. L. 1840, sec. 2; 2 R. S. (4th ed.) 249, sec. 52.

(d) *Ante*, p. 24, S. L. 1837, 537; 2 R. S. (4th ed.) 420, sec. 11.

that on any proceedings or matter in controversy before a surrogate, when the testimony of a witness in any other state or territory of the United States, or any foreign place, is required by any party to such proceedings or controversy, the surrogate may issue a commission to take such testimony in the same manner as by law the same may be done in any court of record.

Under this section the examination of the witnesses to wills executed abroad, and the witnesses to which resided abroad, has been taken in repeated instances, under commissions issued out of the Surrogate's Court. The usual and proper proceedings to prove the will having been instituted before the surrogate, he clearly acquired jurisdiction to issue the commission, when it was found that the witnesses resided abroad, and their testimony was required by any party to the proceedings or controversy. The commission to examine such witnesses accordingly duly issued.

The language of the section is general, extending to "any proceedings or matter in controversy before a surrogate," and would seem to cover every case embraced in the foregoing sections of the Revised Statutes, authorizing the issuing of a commission by the Chancellor [now the Supreme Court.] Even the proving, under a commission issued out of the Surrogate's Court, of a duly exemplified or authenticated copy of a will, where the original will may be in the possession of a court or tribunal of justice in another country or state, whence the same cannot be obtained, and the proving of wills of personal estate, duly executed by persons residing out of this state, according to the laws of the state or country in which the same were made, may, if the preliminary proceedings show jurisdiction in the surrogate, by reason of the inhabitancy of the decedent within his county, or his death, leaving assets therein, or his having left personal or real estate therein, be deemed to be authorized by the words of this section. The Revised Statutes do not confer exclusive jurisdiction upon the Chancellor to issue the commission in these latter cases, any more than in the cases where the witnesses simply reside abroad. As yet, however, wills in the possession of a foreign tribunal whence the same could not be obtained, and wills executed according to the laws of a foreign state or country, have invariably been proved under a commission issued out of the Court of Chancery, or since the new system went into operation, the Supreme Court. The practice in the Surrogate's Court on taking out a commission to prove a will, has been fully explained at a previous page.(e)

The law respecting the proving and validity of wills of personal property made by persons domiciled abroad, or executed out of this state, by persons not citizens of this state, is fully and clearly stated by the Chancellor in his opinion "*In the Matter of Catharine Roberts' Will*."(f) He says:

"There appears to be some difference of opinion among foreign ju-

(e) *Ante*, pp. 158, 161. For directions as to the petition and proceedings on taking out a commission to prove a will in the Court of Chancery, see *In the Matter of F. Atkinson's will*, 2 Paige, 214. *In the Matter of Easton's will*, 6 Paige, 183.

(f) 8 Paige, 524.

rists, whether a will of personal estate, or movable property as it is called by the civilians, in which the testator has complied with the forms and solemnities required by the *lex loci actus*, is a valid testamentary disposition of such property, although in the form of its execution, such will does not conform to the requirements of the law of the testator's domicile. The better opinion, however, appears to be, that so far as regards the mere formal execution of the testament, it is sufficient if it conforms to the law of the country where the will is made; in accordance with the maxim, *locus regit actum*. (See 17 *Guyot's Repert, De Juris*, art. *Testament*, 186; 4 Burge's Col. and Foreign Law, 583; Civil Code of Louis, art. 1589.) Probably the testament may also be valid, if made and executed in conformity to the law of the testator's domicile, although it does not conform, in all respects, to the *lex loci actus*. (See Target's opinion in the case of the Duchess of Kingston's will, 1 Collect. Jur. 324; Story's Confl. of Laws, 391; 4 Burge's Col. and For. Laws, 582, 584, 590.) And it appears to be the generally received doctrine at the present day, that the *status* or capacity of the testator to dispose of his personal estate by will, depends upon the law of his domicile."

"Our Revised Statutes seem to contemplate the validity of a will of personal property, by a citizen of this state, if made in conformity to the requirements of our law, although executed out of this state, and in a place where the local laws require the adoption of a different form. This appears to be a distinct recognition of the principle that the will may be valid, if made and executed in conformity with the law of the testator's domicile. (2 R. S. (2d ed.) p. 12, sec. 69.) The statute also in express terms authorizes a will of personal property executed out of the state by a person not domiciled here, to be admitted to probate, provided it is duly executed according to the laws of the state or country where the same was made; and prohibits all other foreign wills from being admitted to probate under the special provisions incorporated into the statutes by the amendments of April, 1830. As those provisions refer to the mode of establishing foreign wills under a commission to be issued by this court, or upon the production of the foreign probate alone to the surrogate without further proof, they do not necessarily exclude the idea that a will of personal property made by a testator domiciled abroad may be valid, if executed according to the law of his domicile; although the form of its execution is not in accordance with the law of the place where he actually executed it, during a temporary absence from his place of residence. But the mode of proving such a will here, if it is valid, as I think it would be, must be different from that which is prescribed by these special provisions of the Revised Statutes relative to foreign wills; and this court has no jurisdiction in such a case."

The omission in the statute adverted to by the Chancellor, to provide for the case of a will executed according to the law of the domicile of the testator, but not according to the law of the place where the will was made, was considered in the recent case of *Isham v. Gibbons*,(g)

(g) 1 Bradf. Surr. Rep. 69, 79.

before the surrogate of the county of New York, and the surrogate came to the conclusion that the 77th section of the act of 1837,^(h) authorizing the surrogate to issue commissions for the examination of witnesses abroad, enables foreign wills to be proved before him in all cases without resorting to the aid of the Court of Chancery or the Supreme Court, under the amendments of 1830. A will of personalty valid according to the law of the domicile of the testator, but not valid according to the law of the place where it was made, may now, therefore, be proved before the surrogate, under a commission issued for the examination of foreign witnesses. "I think," says the surrogate, "this completes the power of this court in relation to the probate of foreign wills, in all cases whatever, without reference to any special statutory provisions. There is here both jurisdiction to take the proof, and the means of taking it."

It would without doubt be a correct and the safest rule on a will of a person not a citizen of this state, and who at the time of his death was domiciled abroad, and did not die in this state, being propounded before the surrogate, to pursue the practice prescribed in the preceding pages, and to require in the preliminary proceedings that a citation should be served on the next of kin, or other persons entitled to the succession in case of intestacy, according to the *lex domicilii* of the decedent, and on proving its execution, that the competency of the decedent to execute a will according to the same law, and its execution according to the law of the place where it was executed, should be established. If, in addition to this, the persons cited in the preliminary proceedings should be those demanded by the laws of this state, and the will should be proved to have been executed in conformity with those laws, the whole ground will be covered.⁽ⁱ⁾

Similar entries and orders are to be made and entered in the books of the surrogate upon the sufficiency of the proof of the will of a non-inhabitant, to those on the proof of a will of an inhabitant of the county; and if the will be established, the record of the will and proceedings will be in all respects like those in the latter case. The certificate on the will, and the probate also, will be the same in form. If the will be not established, an order for its rejection must be entered, and the testimony must be recorded, as in the cases arising under the first subdivision of the statute.

Upon the ground that the law of the domicile of the testator regulates the decision as to what constitutes his last will, it has been the practice in England upon the production of an exemplified copy of the probate granted by the proper court in the country where the deceased died domiciled, for the Prerogative Court to follow the grant upon the

(h) S. L. 1837, 537; 2 R. S. (4th ed.) 420, sec. 11. *Ante*, p. 24.

(i) The most convenient and the strictly correct course to be pursued in respect to a will of a non-inhabitant, if it be important to take out probate here, is to obtain such probate on the production of a duly exemplified copy of the will, from under the seal of the proper court of the place of which the deceased was an inhabitant. This would be conclusive of the validity and due execution of the will, according to the law of the domicile of the decedent. If the will relate to real estate as well as personal property within this state, as to the real estate, it must be proved according to the law of this state, and the record on such proof will be the only one necessary, although the probate be granted on the exemplification.

application of the executor, in decreeing its own probate.(j) The same practice is authorized by the above quoted 68th section of the statute, in respect to wills of personal estate duly executed by persons residing out of this state according to the laws of the state or country in which the same were made, and by the second section of the act of 1840, where such will shall have been duly executed in this state by a person not a resident of this state. The foreign decree of course does not govern *proprio vigore*, but is received as evidence, and is admitted not only *ex comitate*, but for reasons of convenience, as in general affording the most ready, safe and certain mode of ascertaining that law which is to decide the validity of the instrument.(k) Under the provisions of the statutes referred to, it has been the practice in the court of the surrogate of the county of New York, to admit and record the exemplification of a will proved abroad, upon the production of a copy of the same under the seal of the foreign court or tribunal, without any evidence further than the seal and the papers themselves, of their authenticity. The will and the certificates of genuineness and proof are recorded at length. (For the usual form of the record, see Appendix, No. 22.)

In the case of the will of a non-inhabitant, executed according to the law of the domicile, but not according to the law of the place of execution, the same practice it seems is to prevail. The surrogate has, by express provision of the statute, exclusive jurisdiction to take the proof of the last will and testament of any deceased person, not an inhabitant of this state, dying in the county, and leaving assets therein. On the return of the citation to the widow and next of kin, instead of an original will being produced, and witnesses examined, should an exemplification of the probate of a will by a court of probate of a state or country where the deceased was domiciled, be offered in evidence before the surrogate, he would doubtless be bound to receive it as the highest evidence of a valid will. Once having acquired jurisdiction of the subject matter, it seems clear that he should be governed by those universal rules, which, in the application of the *lex domicilii* to testamentary cases, have been recognized by sound and enlightened jurists, and have been received with approbation by courts of justice.(l)

The mandate from the Court of Chancery for the recording of a will proved there, by the surrogate of the county having jurisdiction, is, pursuant to the above section numbered 67, entered upon the record entire.(m)

(j) Williams on Exrs. 308.

(k) 1 Bradf. Surr. Rep. 75.

(l) *Isham v. Gibbons*, 1 Bradf. Surr. Rep. 75.

(m) This record, in the office of the surrogate of the county of New York, will be found in the book of surrogate's daily minutes.

The proving of lost and destroyed wills, is provided for and regulated by the following sections of the statutes. Although not necessarily embraced within the design of this work, they are here inserted for the purpose of presenting a complete view of the subject.

Sec. 70. [Sec. 63.] Whenever any will of real or personal estate shall be lost or destroyed by accident or design, the Court of Chancery shall have the same power to take proof of the execution and validity of such will, and to establish the same, as in the case of lost deeds. 2 R. S. 67.

Sec. 71. [Sec. 64.] Upon such will being established by the decree of a competent court, such decree shall be recorded by the surrogate before whom the will might have been proved, if not lost or destroyed, and letters testamentary, or of administration, with the will annexed,

Of Certain Exemplifications, Copies and Records of Wills.

An exemplification of the record of a will, merely, without the proofs, cannot be received in evidence. The whole record (including the proofs) must be certified.(n) The record of a will is only *prima facie* evidence of its authenticity, and may be repelled by contrary proof.(o)

Sec. 20. The exemplification of the record of any last will and testament, proved before the judge of the former Court of Probates, and recorded in his office before the first day of January, one thousand seven hundred and eighty-five, certified under the seal of the officer in whose custody such record shall be, shall be received in evidence in all cases, after it shall have been made to appear that diligent and fruitless search has been made for the original will.(p)

Sec. 1. The exemplification of the record of any last will and testament, proved before the surrogate of any county in this state, before the first day of January, one thousand eight hundred and thirty, certified under the seal of the officer having the custody of such record, shall be received in evidence with the like effect, as if the original will had been produced.(q)

Sec. 68. The clerks of the Supreme Court, and the surrogates of the several counties, may make exemplified copies of any last will which shall have been proved in their respective courts as a will of real estate, together with all the notices, citations and proofs relating to the same; and such exemplified copies may be recorded in the book kept for recording wills of real estate by the surrogate of any county in which any lands of the testator shall be situated. The fees for such copies, and recording the same, shall be paid by the person on whose application the services shall be rendered.(r)

The act of the 11th May, 1846, provides as follows:

Sec. 1. Any will of real estate, which shall have been duly proved in the Supreme Court, or Court of Chancery, or before the surrogate of any county in this state, with the proofs taken on the proof thereof, and the certificate of proof annexed thereto, or indorsed thereon, may be recorded in the clerk's office of any county in this state, in the same manner that conveyances of real estate are now authorized to be recorded. Any exemplification of the record of any such will from the office of the clerk of the Supreme Court, register, assistant register, or

shall be issued thereon by him, in the same manner as upon wills duly proved before him. 2 R. S. 67.

By the 73d section, (2 R. S. 68,) it is declared that these two sections shall extend to wills of real and personal property executed at the time the act took effect.

By the 74th section, it is declared, that no will of any testator who died after the sixth chapter of the second part of the Revised Statutes took effect as a law, shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator; or be shown to have been fraudulently destroyed in the lifetime of the testator; nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness.

(n) *Morris v. Keyes*, 1 Hill, 540.

(o) 2 R. S. 58, sec. 15.

(p) 2 R. S. 59; 4th ed. 243.

(q) S. L. 1850, chap. 94, p. 143. As amended by S. L. 1852, chap. 175, p. 236; 2 R. S. (4th ed.) 649, 1035.

(r) S. L. 1837, 536; 2 R. S. (4th ed.) 243.

clerk in Chancery, or surrogate, where the same may be recorded, or from any other office where the same hereafter by law be recorded, may, in like manner be recorded in the clerk's office of any county. The record of such will or exemplification so made as aforesaid, and the exemplifications of such record shall be received in evidence, and shall be as effectual in all cases as the original will would be, if produced and proved, and may, in like manner be repelled by contrary proof.(s)

Sec. 3. On recording any such will or exemplification, the clerk shall index the same in the indices of deeds, substantially as such clerks are now required to index deeds recorded in their offices.

Sec. 4. Such clerks shall receive for such recording, the same fees which shall be, from time to time, allowed them for the recording of conveyances of real estate; and any executor of a will, or administrator with the will annexed, who shall procure such will to be recorded in the clerk's office of any county in which the lands devised thereby may be situated, shall be allowed the fees paid by him for such recording in the settlement of his accounts.(t)

By the act of June 24, 1851,(u) the provisions of the act of 1846, so far as they relate to the clerks of the several counties of this state, are declared to apply to the register of the city and county of New York, with the like effect as to the clerks of the other counties of this state, and as if such register had been specifically named in said act.(v)

Of Proving Nuncupative Wills.

Sec. 22. No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea.(w)

(s) S. L. 1846, chap. 182, p. 204; 2 R. S. (4th ed.) 169, sec. 42.

(t) *Ib.*

(u) S. L. 1851, chap. 277, p. 555; 2 R. S. (4th ed.) 170.

(v) Sec. 81. [Sec. 67.] The clerk of every county in this state, the register of deeds in the city and county of New York, and the surrogate of every county, upon being paid the fees allowed therefor by law, shall receive and deposit in their offices respectively, any last will or testament which any person shall deliver to them for that purpose, and shall give a written receipt therefor to the person depositing the same. 2 R. S. 404; 4th ed. 650.

Sec. 82. [Sec. 68.] Such will shall be enclosed in a sealed wrapper, so that the contents thereof cannot be read, and shall have indorsed thereon the name of the testator, his place of residence, and the day, month and year when delivered, and shall not, on any pretext whatever, be opened, read or examined, until delivered to a person entitled to the same, as hereinafter directed. *Ib.*

Sec. 83. [Sec. 69.] Such will shall be delivered only.

1. To the testator in person; or,
2. Upon his written order, duly proved by the oath of a subscribing witness; or,
3. After his death, to the persons named in the indorsement on the wrapper of such will, if any such indorsement be made thereon; or,
4. If there be no such indorsement, and if the same shall have been deposited with any other officer than a surrogate, then to the surrogate of the county. *Ib.*

Sec. 84. [Sec. 70.] If such will shall have been deposited with a surrogate, or shall have been delivered to him as above prescribed, such surrogate, after the death of the testator, shall publicly open and examine the same, and make known the contents thereof, and shall file the same in his office, there to remain until it shall have been duly proved, if capable of proof, and then to be delivered to the person entitled to the custody thereof, or until required by the authority of some competent court to produce the same in such court. *Ib.*

(w) 2 R. S. 60; 4th ed. 243. See *ante*, p. 119.

Applications for the proof of nuncupative wills are unfrequent. In the court of the surrogate of the county of New York, none have been proved for the last several years.

The preliminary proceedings for obtaining probate must be similar to those on proving written wills. The petition should properly set forth the expressions of the decedent which are proposed to be established as testamentary. The citation to the next of kin ought to state the will as an unwritten one. There must be at least two witnesses who were present at the uttering of the words, and the will itself will be embodied in their testimony. The probate will contain the will as made up from their statements.(x)

Of Proceedings where all the Subscribing Witnesses to a Will are Dead, Insane, or Non-residents.

Sec. 16. If it shall appear to the satisfaction of the surrogate that all the subscribing witnesses to any will devising real estate, are dead, insane, or reside out of the state, the surrogate shall take and receive such proof of the handwriting of the testator, and of either or all the subscribing witnesses to the will, and of such other facts and circumstances as would be proper to prove such will on a trial at law.(y)

Sec. 17. The proofs and examinations taken under the last preceding section, shall be signed, certified and recorded by the surrogate as herein before provided, and the will shall be deposited with him.

Sec. 18. The record of the proofs and examinations taken pursuant to the provisions of the two last preceding sections, and the exemplifications of such record, by the surrogate in whose custody it may be, shall be received as evidence upon any trial or controversy concerning the same will, after it shall have been proved in such trial or controversy, that the lands in question therein have been uninterruptedly held under such will, for the space of twenty years before the commencement of the suit in which such trial or controversy shall be had; and shall be of the same force and effect as if taken in open court, upon such trial, or in such controversy.(z)

The preliminary proceedings under these sections must be like those in the ordinary case of proving devises of real estate. The same practice was expressly required in both cases by the Statute of 1813,(a) from which these provisions are taken, and it is presumed that it was not intended to alter the rule under the Revised Statutes. The proofs and examinations are to be signed, certified and recorded by the surrogate, and the will is to be deposited with him,* but not to be recorded. There should be a certificate at the end of the record, stating that it had been made to appear, to the satisfaction of the surrogate, that all the subscribing witnesses to the will are dead, insane, or reside out of

(x) See *Hubbard v. Hubbard*, 12 Barb. Sup. Ct. Rep. 148; *Prince v. Hazelton*, 20 Johns. 502; *ante*, pp. 119, 121

(y) 2 R. S. 59; 4th ed. 242.

(z) See *In the Matter of Hornby's will*, 2 Paige, 429.

(a) R. L. 1813, 365, secs. 6 to 9.

the state, and that such record had been made pursuant to these sections of the statute.

It will occur to the reader, that the will may be admitted to probate and recorded, as to the personal estate, under the 20th section of the law of 1837,^(b) and that the same record will be sufficient as to the testimony under the sections in question, if the certificate above described be annexed, and the will be deposited with the surrogate.

Of Compelling the Production of a Will before the Surrogate for Proof.

The 10th and 11th sections of the first title of the 6th chapter of the 2d part of the Revised Statutes, contain the only existing provisions for compelling the production of a will before the surrogate.^(c)

Under the Revised Statutes, previous to the law of 1837, the preliminary proceedings on proving wills of real estate, as was shown at a previous page,^(d) were by notice of the intention to prove the will given to the heirs of the testator.

The above mentioned 10th section provides that witnesses may be summoned by subpoenas, to be issued by the surrogate, at any time before the day specified in such notice, which may be served as in cases of personal actions; and a clause may be added to any such subpoena, commanding any person having the custody of, or power over any such will, to produce the same before the said surrogate, for the purpose of being proved.

By the 11th section, disobedience to any such subpoena shall be proceeded against and punished, as in other cases of proceeding before surrogates. If any person be committed for not producing any will, he may be discharged, on producing the same to the surrogate who committed him, by an order for that purpose.

By the 18th section of the act of 1837,^(e) these provisions are made applicable to wills of both real and personal estate, or either; and it is directed that the said tenth section shall apply to proceedings by citation under the said act, in the same manner that it formerly applied to proceedings on notice under the Revised Statutes.

It will be observed, then, that a person having the possession of a will, cannot be obliged to produce the same before the surrogate, unless in obedience to a *subpoena duces tecum*, directed to him for that purpose. This, by the words of the section, may be issued before the day specified in the notice, (citation,) which implies that the proper preliminary proceeding for proving the will should be first taken. The subpoena may be issued whilst the citation is running, and may be made returnable on the return day of the citation.

Subpoenas under these sections will be similar to that at Appendix No. 9, adding the *duces tecum* clause. The minute of issuing the same to be made by the surrogate should describe the subpoena as a *subpoena duces tecum*.

Sec. 75. [Sec. 68.] The provisions of the first title of the 6th chapter

(b) See *ante*, p. 183.

(c) 2 R. S. 58; 4th ed. 242.

(d) *Ante*, p. 142, note x.

(e) See *ante*, p. 161.

of the second part of the Revised Statutes, in relation to the proof and probate of wills and the jurisdiction of the surrogate, and his proceedings thereon, apply as well to wills made previous, as to those made subsequent to the time when the said chapter took effect.(f)

Sec. 77. [Sec. 70.] The provisions of the said title are not to be construed to impair the validity of the execution of any will made before the said chapter took effect, or to affect the construction of any such will.(f)

Sec. 78. [Sec. 71.] The term "will," as used in the said chapter, includes all codicils, as well as wills.(f)

Appeals from decrees of surrogates, either establishing or rejecting a will, will be considered under the general head of appeals from the orders and decrees of surrogates.

CHAPTER III.

OF THE APPOINTMENT OF EXECUTORS, THE GRANTING OF LETTERS TESTAMENTARY, AND THE ACCEPTANCE OR REFUSAL OF THE OFFICE OF EXECUTOR.

AN executor, as the term is at present accepted, may be defined to be, the person to whom the execution of a last will and testament of personal estate is, by the testator's appointment, confided.(a) "To appoint an executor," says Swinburne,(b) "is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts, and performance of his will."

The bare nomination of an executor, without giving any legacy, or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved.(c)

Who is capable of being an Executor.

Generally speaking, all persons, who are capable of making wills, and some others besides, are capable of being made executors.(d) From the earliest time it has been a rule, that every person may be an executor, saving such as are expressly forbidden.(e)

The statute expressly declares what persons are forbidden to become executors. They are, generally, such as are incapable in law of making a contract, under the age of twenty-one years, aliens not inhabitants of

(f) 2 R. S. 68.

(a) 2 Black. Comm. 503; *Farrington v. Knightly*, 1 P. Wms. 548, 549; Toller, 30; Wms. on Exrs. 185.

(b) Swinb. part 4, sec. 2, pl. 2.

(c) Godolph. part 2, ch. 5, sec. 1. See *Campbell v. Logan*, 2 Bradf. Surr. Rep. 90, 94.

(d) 2 Black. Com. 503.

(e) Swinb. part 5, sec. 1, pl. 1.

this state, those convicted of infamous crimes, or who are incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding.^(f) The precise terms of the statutory provision will be particularly considered, and more conveniently, in connection with the subsequent branch of the present chapter of the granting of letters testamentary.

Of the appointment of executors.—By what words Executors may be appointed.

An executor can derive his office from a testamentary appointment only.^(g)

"His appointment may either be express or constructive, in which case he is usually called executor *according to the tenor*; for, although no executor be expressly nominated in the will, by the word executor, yet, if by any word or circumlocution, the testator recommend, or commit to one or more the charge and office, or other rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors.^(h)

"As if he declare by his will that A. B. shall have his goods after his death to 'pay his debts, and otherwise to dispose at his pleasure,' or to that effect, by this A. B. is made executor.⁽ⁱ⁾ So, if the testator say, 'I commit all my goods to the administration of A. B.,'^(j) or 'to the disposition of A. B.,'^(k) in this case he is made executor. And where certain persons were directed by the will to pay debts, funeral charges, and the expenses of proving the will, they were held to be clearly executors according to the tenor.^(l) So, where the testator in a codicil, said, 'I appoint my nephew my residuary legatee, to discharge all lawful demands against my will,' the nephew was admitted executor.^(m) So, if the testator say, 'I make A. B. lord of all my goods,'⁽ⁿ⁾ or 'I make my wife lady of all my goods,'^(o) or 'I leave all my goods to A. B.,'^(p) or 'I leave A. B. legatary of all my goods,'^(q) or 'I leave the residue of all my goods to A. B.,'^(qq) it will amount to the appointment of such persons respectively as executors according to the tenor."^(r)

(f) See 2 R. S. 69, (4th ed.) 255.

(g) Wms. on Exrs. 196.

(h) Swinb. part 4, sec. 4, pl. 3; Godolph. part 2, ch. 5, sec. 2; Wentw. Off. Ex. 20, (14th edition.)

(i) Ibid. So, where one said on his death-bed to his wife that she *should pay all and take all*, by this she was executrix. *Brightman v. Keighley*, Cro. Eliz. 43.

(j) Godolph. part 2, ch. 5, sec. 3; Bro. Executors, pl. 73.

(k) *Pemberton v. Cony*, Cro. Eliz. 164; Godolph. part 2, ch. 5, sec. 3. So, if he says, "I will that A. B. shall dispose of my goods which are in his custody," he is thereby made executor of those parcels of goods. Ibid.

(l) *In the Goods of Fry*, 1 Hagg. 80.

(m) *Grant v. Leslie*, 3 Phillim. 116.

(n) Godolph. part 2, ch. 5, sec. 3; Swinb. part 4, sec. 4, pl. 3.

(o) Swinb. part 4, sec. 4, pl. 3.

(p) Godolph. part 2, ch. 5, sec. 3; Swinb. part 4, sec. 4, pl. 3.

(q) Ibid.

(qq) Ibid. "I devise all my personal goods to my two daughters and my wife, whom I make executrix:" this was holden to appoint them all three executrices. *Foxwith v. Tremaine*, Ventr. 102.

(r) Wms. on Exrs. 196-7. In *Androvin v. Poilblanc*, 3 Atk. 301, Lord Hardwicke said a

So, in the case of the will of Robert Bogardus, deceased, before the surrogate of the county of New York, 4th December, 1841, the words of the will were, "I do hereby give, devise and bequeath, unto my loving wife Maria Sabina, all my estate, both real and personal, of what kind or nature soever the same may be, to have and to hold the same to her my said wife, her heirs and assigns, to the only proper use, benefit and behoof of my said wife, her heirs and assigns forever, with full power to grant, bargain, sell, alien and dispose of the same;" and there was no express appointment of an executor. It was held, that Mrs. Bogardus was entitled to letters testamentary, and the same were granted to her.

Again, in *Ex parte McDonnell*,(s) where the testator bequeathed as follows: "After all my just debts being paid, I wish my brother, Edward McDonnell, to invest my property, consisting of a farm near Dubuque; about six hundred dollars in the Greenwich Savings Bank; one hundred and fifty dollars owing to me by my said brother, E. McD., and one hundred dollars lent by me to J. McD.; my stock of liquors and chattel property, when converted into cash—the whole amount to be invested in some safe bank in the city of New York, and the interest accruing thereupon to be transmitted semi-annually to my father; and the capital at my father's death, to be divided, share and share alike, among my three brothers;" it was held, that the brother was appointed executor according to the tenor. "It is very manifest," said the surrogate, "that the testator has here committed the administration of all his estate to his brother Edward. The words, 'after all my just debts being paid,' if they were followed by a mere gift, would throw a doubt over such a construction. But they are in immediate connection with the bestowal of powers identical with those of an executor, such as the collection, sale and conversion of his estate into cash, its investment, the payment of the interest, and the distribution of the principal. It could not have been designed to entrust these important duties to his brother, and commit to an administrator the payment of his debts; on the contrary, the most sensible reading seems to be that the payment of debts, as well as the other executory powers mentioned in immediate connection, were all intended to be committed to the charge of the same person, instead of being broken and separated. It thus appearing that the testator designated his brother as the person to execute his will, and the use of the word "executor" not being essential to the appointment, letters testamentary may issue to the applicant.

So, where there was a mutual will executed by a husband and wife at the Island of St. Croix, where the parties were then resident, according to the Danish law, and the will declared that the survivor, during his or her natural life, should "remain in full and undivided possession" of all the estate, "real or personal, landed property or movable,

person named "universal heir," in a will, would have a right to go to the Ecclesiastical Court for the probate. See, also, *Fleming v. Boting*, 3 Call, 75; Wentw. Off. Ex. p. 20, (14th edition;) Swinb. part 4, sec. 4, pl. 7. See *Friswell v. Moore*, 3 Phillim. 138, *William v. Walker*, 1 Hag. 71, and *In the Goods of Davis*, 3 Curt. 748, 749, for instances where a party was held not to be executor according to the tenor. *Pickering v. Towers*, 2 Cas. Temp. Lee, 401. S. C., Amb. 364.

(s) 2 Bradf. Surr. Rep. 32.

nothing whatsoever excepted, without any interference of the Dealing Court or any other authority." This being a common, if not usual provision, in the mutual wills made according to the course of the civil law, and its effect being to devolve upon the survivor the whole administration of the estate. It was held, that this was a constructive appointment of the survivor, to be executor—an authority implied from the general bequest of the entire estate, "in full and undivided possession," and that the widow, who was the survivor, might, therefore, qualify as executrix according to the tenor.(t)

But where a testator, being entitled to many shares in the Sun Fire office, and in the mines of Scotland, and a lease for years of a coal meter's place, gave the same, by a will containing no appointment of an executor, to trustees in trust for his daughter, and after several contingencies, gave the remainder thereof to his son, and if he should die in his minority without issue, gave the remainder thereof to the trustees for their own use, and gave all the residue of his estate to the said trustees, to pay one moiety to his daughter, and the other moiety to his son; it was held, that there were no words in this will that made the trustees executors; inasmuch as they had only power to pay what was vested in them as trustees, to the particular persons for whose use they held it, but had not a general power to receive and pay what was due to and from the estate, which is the office of an executor.(u)

"An executor may be appointed by necessary implication: as where the testator says, 'I will that A. B. be my executor, if C. D. will not;' in this case C. D. may be admitted, if he please, into the executorship.(v) So, where the testator gave a legacy to A. B. and several legacies to other persons, among the rest, to his daughter in law, C. D.; immediately after which legacies followed these words: 'But should the within-named C. D. be not living, I do constitute and appoint A. B. my whole and sole executrix of this my last will and testament, and give her the residue;' probate was decreed to C. D., as executrix by implication, according to the tenor of the will.(w) Or, if the testator, supposing his child, his brother, or his kinsman, to be dead, say in his will: 'Forasmuch as my child, my brother, &c., is dead, I make A. B. my executor;' in this case, if the person whom the testator thought dead be alive, he shall be executor.(x) So, where a man made his last will, and did will thereby, that none should have any dealings with his goods until his son came to the age of eighteen years, except J. S., by this J. S. was held to be made executor during the minority of the son.(y) Where the testator named his wife his executrix, and A. B.

(t) *Ex parte McCormick*, 2 Bradf. Surr. Repts. 169.

(u) *Bodicot v. Dalzell*, 2 Cas. Temp. Lee, 294. See, also, *Fawkener v. Jordan*, Ibid. 327; *Wms. on Exrs.* 198.

(v) Godolph. part 2, ch. 5, sec. 3; Swinb. part 4, sec. 4, pl. 6. If the testator makes A. B. or C. D. his executors, in this case they shall both be executors, for, "or" shall be construed "and." Godolph. part 2, ch. 5, sec. 3, ch. 3, sec. 1.

(w) *Naylor v. Stainsby*, 2 Cas. Temp. Lee, 54.

(x) Godolph. part 2, ch. 5, sec. 3; Swinb. part 4, sec. 4, pl. 6.

(y) *Brightman v. Keighley*, Cro. Eliz. 43. However, in Godolphin, part 3, ch. 3, sec. 5, it is laid down, that if the testator say, "If my son, A. B., marry with C. D., let him not be my executor," or "one of my executors," this would not hold; because an "executor may not be instituted, nor the office of executor inferred, only by conjecturals." See *Wms. on Exrs.* 198-9.

to assist her, it was held that A. B. might be executor according to the tenor.(z)

"Although, when there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office, yet there is no objection, either in principle or practice, to admit an executor according to the tenor to probate, jointly with an executor expressly nominated. Thus, in *Powell v. Stratford*,(a) the testator's wife was expressly named as executrix; and Lord H. was to assist her, but he was not called executor; the court said he might be so according to the tenor.(b)

Applications, however, for letters testamentary, by persons appointed executors, by construction or implication, or otherwise than expressly, are not favored by the courts, and if there be any dispute or uncertainty in the case, the party must take administration with the will annexed.

An executor may be appointed solely, or in conjunction with others: but in the latter case, they are all considered in law in the light of an individual person.(c) Likewise a testator may appoint several persons as executors in several degrees; as where he makes his wife executrix, but if she will not, or cannot be executrix, then he makes his son executor: and if his son will not, or cannot be executor, then he makes his brother, and so on.(d) In which case, the wife is said to be *instituted* executor in the first degree, B. is said to be *substituted* in the second degree, C. to be *substituted* in the third degree, and so on.(e) It must be observed, that if an instituted executor once accepts the office, and afterwards dies intestate, the substitutes, in what degrees soever, are all excluded; because the condition of law, (if he will not, or cannot be executor,) was once accomplished by such acceptance of the instituted executor.(f) But where a testator appoints an executor, and provides that, *in case of his death*, another should be substituted: on the death of the original executor, although he has proved the will, the executor so substituted may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the testator's lifetime, or afterwards.(g)

In what Ways the Appointment of Executor may be Qualified.

The appointment of an executor may be either absolute or qualified.

(a) *Powell v. Stratford*, cited 3 Phillim. 118.

(a) Prerog. 1803, 3 Phillim. 118. See, also, *Collard v. Smith*, Prerog. 1799; Ibid. 117.

(b) Wms. on Exrs. 200. See, also, *Grant v. Leslie*, 3 Phillim. 116. If a man makes J. N. his executor, and devises goods to him, and to W. S., to devise for his soul, W. S. is executor of these goods by these words as well as J. N. is. Bro. Executors, pl. 98. See, also, *Lynch v. Bellew*, 3 Phillim. 424; *In the Goods of Aird*, 1 Hagg. 336. *In the Goods of Cringan*, 1 Hagg. 548; the testator in this case died in Scotland; and Sir John Nicholl said, he was informed that such a provision, as to the appointment of executors, is not very unusual in that country.

(c) Toller, 37. See post.

(d) Swinb. part 4, sec. 19, pl. 1; Godolph. part 2, ch. 4, sec. 1.

(e) The substituted executor cannot propound the will, till the person first named executor has been cited to accept or refuse the office. *Smith v. Crofts*, 2 Cas. Temp. Lee, 557.

(f) Swinb. part 4, sec. 19, pl. 10; Godolph. part 2, ch. 4, sec. 2.

(g) *In the Goods of Lighton*, 1 Hagg. 235; Wms. on Exrs. 201-2.

It may be absolute, when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects, or limitation in point of time.^(h) It may be qualified, by limitations as to the time or place wherein, or the subject matters whereon, the office is to be exercised: or the creation of the office may be conditional.⁽ⁱ⁾

But qualified appointments of executors are extremely uncommon in this state, and the subject is not deemed one warranting extended comment in these pages.

Of the Transmission of the Appointment of Executor.

Although the executor cannot assign the executorship,^(j) yet it was formerly the law that the interest vested in him by the will of the deceased might, generally speaking, be continued and kept alive by the will of the executor; so that, if there was a sole executor of A., the executor of such executor was, to all intents and purposes, the executor and representative of the first testator.^(k) But this is now expressly abolished by statute, the Revised Statutes providing on the subject as follows:

Sec. 17. No executor of an executor shall, as such, be authorized to administer on the estate of the first testator; but, on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the assets of the first testator left unadministered, shall be issued in the manner and with the authority hereinafter provided.^(l)

Sec. 11. An executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof, as such executor.^(m)

Of an Executor de Son Tort.

Formerly if one, who was neither executor nor administrator, intermeddled with the goods of the deceased, or did any other act characteristic of the office of executor, he thereby made himself what was called, in the law, an executor of his own wrong, or, more usually, an executor *de son tort*.⁽ⁿ⁾

When a man had so acted, as to become in law an executor *de son tort*, he thereby rendered himself liable, not only to an action by the

(h) Toller, 36. Swinb. part 4, sec. 17, pl. 1; Wentw. Off. Ex. 22, (14th edition.)

(i) Wms. on Exrs. 203.

(j) *Bedell v. Constable*, Vaugh. 182.

(k) See Wms. on Exrs. 207, and authorities cited.

(l) 2 R. S. 71; 4th ed. 257. For the manner of issuing letters of administration, with the will annexed, see *post*, chap. 4.

(m) 2 R. S. 488; 4th ed. 691.

(n) "The definition of an executor *de son tort*, by Swinburne, Godolphin and Wentworth, is in the same words, viz., "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the [Ecclesiastical] Court to administer." Swinb. part 4, sec. 23, pl. 1. Godolph. part 2, ch. 8, sec. 1. Wentw. Off. Ex. ch. 14, p. 320, (14th edition.) But the term is in the older books, sometimes applied to a lawful executor, who mal-administers; as by the Lord Dyer, in *Stokes v. Porter*, Dyer, 167 a." Wms. on Exrs. 210. See *Givers v. Higgins*, 4 McCord, 286.

rightful executor or administrator, but also to be sued as executor by a creditor of the deceased, or by a legatee; for an executor *de son tort* had all the liabilities, though none of the privileges, that belong to the character of executor.(o)

But now, an executor *de son tort*, in the sense of the old law, is probably not known to the law of this state. By the Revised Statutes, it was enacted as follows:

Sec. 78. [Sec. 60.] Every person who shall take into his possession any of the assets of any testator or intestate, without being thereto duly authorized as executor, administrator or collector, or without authority from the executor, administrator or collector, shall be liable to account for the full value of such assets to every person entitled thereto, and shall not be allowed to retain or deduct from such assets for any debt due to him.(p)

Sec. 17. No person shall be liable to an action as executor of his own wrong, for having received, taken, or interfered with, the property or effects of a deceased person; but shall be responsible as a wrong-doer in the proper action to the executors, or general or special administrators of such deceased person, for the value of any property or effects so taken or received, and for all damages caused by his acts to the estate of the deceased.(q)

Under these provisions of the statutes, no one can be liable to an action, or to account to the next of kin, as an executor of his own wrong. Where persons have received and disposed of the property of a testator, without having been duly appointed his executors, or duly authorized to act as such, they are liable to his personal representatives, whenever such representatives shall have been appointed; but not to persons claiming to be next of kin of the decedent merely. The proper course for the next of kin, in such a case, is to procure the appointment of an administrator, and have a suit instituted in his name, to recover the property from any person into whose hands it may have come, and who has converted it to his own use.(r) And where a person named as one of the executors of a will, but who omitted to qualify and was not named as an executor in the letters testamentary, signed the notice of appraisal of the estate, and subscribed and swore to the affidavit annexed to the inventory; it was held, that he was not estopped from denying that he was executor, and that the surrogate could not make or enforce an order to compel him to account.(s)

In *Thorpe v. Amos*,(t) one of the defendants, alleging a *donatio mortis causa*, had obtained possession of some \$30,000 money of the testator. There being no evidence to sustain the gift, the person who had obtained possession of the money was held responsible as a *wrong-doer*, and she and a colluding executor were held liable for the whole sum, although

(o) *Carmichael v. Carmichael*, 1 Phill. C. C. 103, per Lord Cottenham. See Wms. on Exrs. 217.

(p) 2 R. S. 81; 4th ed. 267.

(q) Ib. 449; 4th ed. 691.

(r) *Muir v. Trustees of the Leake and Waits Orphan House and others*, 3 Barb. Ch. Rep. 477. See, also, *Brown v. Brown*, 1 Barb. S. C. R. 195, per McCown, V. C.

(s) *Wever v. Marvin*, 14 Barb. S. C. R. 376.

(t) 1 Sandf. Ch. Rep. 26.

they had distributed it among themselves and the others, although they were permitted to be subrogated to the claimant's remedy against the latter.

Of the Form and Manner of issuing, and the Necessity of obtaining Probate or Letters Testamentary.

A copy of the will by which the executor is appointed, certified under the seal of the Surrogate's Court, is usually called the probate, or the letters testamentary.^(u) Mr. Kirtland, in his *Treatise on Surrogates' Courts*, observes that the meaning of probate of a will, is generally understood to be, the proving the will, making a copy of the same, indorsing the proof on the copy, and granting letters testamentary, under the seal of the surrogate, and annexed to the copy of the will.^(v) The Revised Statutes, however, by directing that each surrogate shall keep a book in which to record all letters testamentary,^(w) and by making special and separate provisions regulating the issuing of such letters, and applying to them alone, would seem to require that they should be considered as something distinct from the probate.

Accordingly, in the county of New York, the probate has consisted of a copy of the will, with a certificate annexed thereto of the correctness of the same, and that the will has been duly proved, and a further certificate simply setting forth the facts that the executor has duly qualified, and that letters testamentary have been issued to him. (For form of the probate, see Appendix, No. 20.) The letters testamentary have been granted and issued apparently as the credentials of the executor's authority to administer the goods, &c., of the testator, and to execute his will, and it has not been the practice to annex to them a copy of the will.

The surrogate before whom the will shall have been proved, has exclusive jurisdiction to issue the letters testamentary. The statutory provision is as follows:

Sec. 20. [Sec. 28.] When any will of personal property shall have been proved before any surrogate having jurisdiction, the jurisdiction over the executors, and the power of granting letters testamentary and of administration with the will annexed, with all powers incidental thereto, shall be exercised exclusively by the surrogate who first took the proof of such will; and no other surrogate shall have power to grant letters of administration upon the estate of such testator.^(x)

And, as has already appeared, the probate of a will of personal property taken by a surrogate having jurisdiction, is conclusive evidence of the validity of the will until such probate be reversed or revoked, or the will be declared void.^(y)

The Surrogates' Court is, therefore, the only court, in which the validity of wills of personalty, or of any testamentary paper whatever relating to personalty, can be established or disputed.^(z) Equity indeed

(u) See *Wms. on Exrs.* 239.

(v) *Kirtland's Surrogate*, (ed. 1835,) p. 46.

(w) 2 R. S. 222; 4th ed. 420; *Ante*, p. 25.

(x) 2 R. S. 61; 4th ed. 243.

(y) *Ante*, p. 172; 2 R. S. 61; 4th ed. 244, sec. 21, (sec. 29.)

(z) *Fonblanq. Treat. on Eq.* part 2, ch. 1, sec. 1, n. a; *Bac. Abr. Exrs. (E.)* 1; *Post*, part 1, book 5, ch. 1; *Gascoyne v. Chandler*, 2 Cas. Temp. Lee, 241.

considers an executor as trustee for the legatees in respect to their legacies, and in certain cases as trustee for the next of kin, of the undisposed surplus: and as all trusts are the peculiar objects of equitable cognizance, courts of equity will compel the executor to perform these, his testamentary trusts, with propriety. Hence, although in those courts, as well as in courts of law, the seal of the Surrogate's Court is conclusive evidence of the *factum* of a will of personal property, (a) an equitable jurisdiction has arisen of *construing* the will, in order to enforce a proper performance of the trusts of the executor. The courts of equity are accordingly sometimes called courts of construction, in contradistinction to the Surrogate's Court, which, although they also are courts of construction, are the only courts of probate. (b)

The consequence of this exclusive jurisdiction in the Surrogate's Court is, that an executor cannot assert or rely on his right in any other court, without showing that he has previously established it in the Surrogate's Court: (c) the usual proof of which is, the production of the letters testamentary or of the probate. In other words, nothing but the probate, or letters testamentary, (or letters of administration with the will annexed, when no executor is therein appointed, or the appointment of executor fails,) or other proof tantamount thereto, of the admission of the will in the Surrogate's Court, is legal evidence of the will in any question respecting personalty. (d)

Of the granting of the Letters Testamentary.

The probate, or letters testamentary, is, however, merely operative as the authenticated evidence, and not at all as the foundation of the executor's title, for he derives all his interest from the will itself, and the property of the deceased vests in him from the moment of the testator's death. Hence, the probate when produced is said to have relation to the time of the testator's death. (e)

The present purpose is to treat of the granting of the letters testamentary. Those terms are in this chapter to be understood in the peculiar and limited sense adopted and applied in the Revised Statutes. In other places, as the words probate and letters testamentary are convertible terms, they will be used indifferently.

Of the Surrogate who must issue the Letters Testamentary.

Besides the provision of the statute already recited, (f) specifying the surrogate who shall have jurisdiction to issue the letters testamentary, the Revised Statutes further provide as follows:

(a) See *ante*, p. 171.

(b) See *Wms. on Exrs.* 238; *Ante*, p. 41.

(c) See *Hensloe's case*, 9 Co. 38 a; *Wentw. Off. Ex.* 83, (14th edition.) *Treat. on Eq.* book 4, part 2, ch. 1, sec. 2; *Chaunter v. Chaunter*, 11 Vin. Abr. 205.

(d) *Rex v. Netherseal*, 4 T. R. 260. If a will be made in a foreign country, and proved there, disposing of goods in England, the executor cannot have action on such probate, but must prove the will there. *Lee v. Moore*, Palm. 165; *Tourton v. Flower*, 3 P. Wms. 370. *Wms. on Exrs.* 239. And the law is the same here. *Lawrence v. Lawrence*, 3 Barb. Ch. Rep. 71; *Smith v. Webb*, 1 Barb. S. C. Rep. 230. See, also, *Brown v. Brown*, 1 Barb. Ch. Rep. 189.

(e) *Wms. on Exrs.* 239, and cases cited.

(f) *Ante*, p. 194; 2 R. S. 61; 4th ed. 243, sec. 20, [Sec. 28.]

Sec. 1. When any will of personal estate shall have been duly admitted to probate, the surrogate who took such proof shall issue letters testamentary thereon, to the persons named therein as executors, who are competent by law to serve as such, and who shall appear and qualify.(g)

Of the Persons who are not competent by Law to serve as Executors.

The general rule is, as has already been stated,(h) that every person may be an executor; saving such as are expressly forbidden. Those persons who are forbidden are declared by the statute as follows:

Sec. 3. No person shall be deemed competent to serve as an executor, who, at the time the will is proved, shall be—

1. Incapable in law of making a contract, (except married women;)
2. Under the age of twenty-one years;
3. An alien, not being an inhabitant of this state;
4. Who shall have been convicted of an infamous crime;
5. Who, upon proof, shall be adjudged incompetent by the surrogate to execute the duties of such trust, by reason of drunkenness, improvidence, or want of understanding.

If any such person be named as the sole executor in any will, or if all the persons named therein as executors, be incompetent, letters of administration with the will annexed, shall be issued, as hereinafter provided, in the case of all the executors renouncing.(i)

Sec. 4. No married woman shall be entitled to letters testamentary unless her husband consent thereto, by a writing to be filed with the surrogate; and by giving such consent he shall be deemed responsible for her acts jointly with her.(ii)

The disqualifications specified in the first three subdivisions of the statute, do not admit of any comment. With respect to the fourth subdivision, it should be observed that no degree of legal or moral guilt or delinquency is sufficient to exclude a person from the executorship, unless such person has been actually convicted of an infamous crime. And the conviction intended by the statute must be upon an indictment or other criminal proceeding.(j) And if the applicant has been guilty of an infamous crime, the surrogate cannot hold it a bar, unless the record of his conviction be produced.(k)

The improvidence specified as a disqualification by the fourth subdivision is, that want of care or foresight in the management of property which would be likely to render the estate and effects of the testator unsafe, and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person. The principle of exclusion, in this part of the statute, is based upon the well known fact that a man, who is careless and improvident, or who is wanting in ordinary care and forecast in the acquisition and preservation of property, for himself, cannot with safety be entrusted

(g) 2 R. S. 69; 4th ed. 255.

(h) *Aule*, p. 187.

(i) 2 R. S. 69; 4th ed. 255.

(ii) *Ib.*

(j) *Coops v. Lowerre*, per Chan. Walworth, 1 Barb. Ch. Rep. 47. See, also, *Harrison v. McMahon*, 1 Bradf. Surr. Rep. 289; *S. C.*, on Ap. 10 Barb. S. C. Rep. 659.

(k) 1 Bradf. Surr. Rep. 289.

with the management and preservation of the property of others.(l) The fact that a man is dishonest, and seeks to obtain the possession of the property of others by theft, robbery, or fraud, is not evidence of his providence or of his improvidence. The surrogate has nothing to do with the immorality of the applicant's occupation, nor can vice or moral delinquency of themselves disqualify a person to act as executor. There are of necessity, degrees of improvidence, from the extreme of habitual and thoughtless waste and extravagance, to occasional or rare improvidencies. The degree requisite to sustain the exclusion of a man who seeks to be an executor, must be such as to render him "*incompetent* to execute the duties of the trust." A man grossly negligent in the management of his property and affairs, and in the contracting of debts, by indorsing for strangers, or for men without visible *means* of payment, may nevertheless not be improvident to such a degree as to render him incompetent to discharge the duties of an executor.(m) Insolvency does not, under the statute, incapacitate a person from being appointed an executor. It is not always evidence of improvidence, or want of prudence. Misfortune will often overtake and ruin the most provident and prudent.(n) But a man who follows gambling as a profession, is from the very nature of his occupation disqualified by reason of improvidence.(o)

A married woman is entitled to letters testamentary, only on filing the written consent of her husband thereto, and then he becomes responsible for her acts jointly with her.

(For form of consent of the husband to the issuing of letters testamentary to his wife, see Appendix, No. 23.)

If, after letters testamentary issued to her, the executrix marry, it is not necessary for her husband to file a written consent with the surrogate, to render him liable for her acts as such executrix. The above provision only applies to cases where the executrix is a *feme covert* when she applies for letters testamentary.(p)

The power of the husband of a married woman, executrix, is substantially that of an executor. His wife cannot act without his concurrence, and he has the power of disposition over the estate. In all proceedings relative to the estate, either the party moving or the executrix, may set up the joint liability of the executrix and her husband; and the husband will then be cited jointly with his wife, to abide the orders of the court in the due administration of the estate.(q) And where the husband of a married woman, executrix, was the surviving partner of the testator, it was *held* that a statement of the partnership affairs was incidentally necessary to the settlement of the accounts of the estate, and that the husband of the executrix must render such co-partnership account.(r)

(l) *Coope v. Lowerre*, 1 Barb. Ch. Rep. 47; *Emerson v. Bowers*, 14 Barb. Sup. Ct. Rep. 658.

(m) See 1 Barb. Ch. Rep. 45.

(n) See *In the Matter of the estate of William Post*, deceased. Dayton's Surr. (1st ed.) Appdx.

(o) See *McMahon v. Harrison*, 10 Barb. S. C. Rep. 659.

(p) *Bunce v. Vandergrift*, 8 Paige, 37; *Woodruff v. Cox*, 2 Bradf. Surr. Rep. 163.

(q) *Woodruff v. Cox*, 2 Bradf. Surr. Rep. 153.

(r) *Marre v. Ginochia*, 2 Bradf. Surr. Rep. 165.

Of the Removal of the Disabilities in certain Cases.

Sec. 5. If the disability of a person under age, or being an alien, or a married woman, named as executor in any will, shall be removed before the execution of such will is completed, such person shall be entitled, on application, to supplementary letters testamentary, to be issued in the same manner as the original letters, and shall thereupon be authorized to join in the execution of such will, with the persons previously appointed.^(s)

When there are two or more executors named in the will, they may severally qualify at different times, from choice, and although no disability exist in the case, and the proving of the will on the application of one of the executors, enures to the benefit of all. If two or more executors qualify at different times, the second and subsequent letters must recite the issuing of the first or previous letters, and contain a clause committing the administration, &c., to the one newly qualified, in conjunction with him or them to whom letters have already been issued. The new executor takes out a duplicate of the probate.

Of the Time when Letters Testamentary may be granted—of Objections to granting the same, and of the Disposition of such Objections.

Sec. 22. Letters testamentary may be granted at any time after the will shall be proved, unless an affidavit shall be made by a widow, legatee, next of kin, or creditor of the testator, setting forth that such person intends to file objections against the granting of such letters testamentary, and that he is advised and believes that there are just and substantial objections to the granting of such letters to the executors named in the will, or some one or more of them. And upon filing such affidavit with the surrogate, he shall stay the granting of letters testamentary for at least thirty days, unless the matter shall be sooner disposed of.^(t)

Sec. 6. If objections be made by any creditor of the testator, or any legatee, relative, or other person interested in his estate, against granting letters testamentary to one or more of the persons named in the will as executors, the surrogate shall inquire into such objections; and if it appear that the circumstances of any person named as such executor, are such that, in the opinion of the surrogate, they would not afford adequate security to the creditors, legatees and relatives of the deceased, for the due administration of the estate, he may refuse letters testamentary to any such person, until he shall give the like bond as is required by law of administrators in cases of intestacy.^(u)

Under these provisions of the statutes, if the circumstances of the executor are such as not to afford adequate security for the faithful discharge of his trust, and the objection is made by a person interested in the estate, the surrogate is bound to require security from the exe-

(s) 2 R. S. 70; 4th ed. 255

(t) S. L. 1837, 528; 2 R. S. (4th ed.) 255, sec. 2.

(u) 2 R. S. 70; 4th ed. 255; form of the bond of administrators. See *Post*, ch. 4.

cutor, and it is not material to inquire whether the testator was aware of the want of responsibility in the executor at the time of making the will. For, if the testator has been so improvident as to commit the administration of his estate to one of insufficient security for the due discharge of his trust, the court must interfere for the protection of the estate against the effects of such improvidence. And where it is proved or admitted that the person named as executor, is about to remove from the state, the surrogate must require security from him, although the directions of the will are that the executor remove with the property bequeathed into another state.^(v)

The affidavit of intention to file objections should set forth that the party is widow, next of kin, or creditor of the deceased, or a legatee under his will as the case may be, and that he or she is advised and believes that there are just and substantial objections to the granting of letters testamentary to the executor or executors named in the will. Thirty days are allowed, after having filed the affidavit, within which to file the objections and dispose of the matter; and within that period, until the objections are filed, all proceedings are stayed. If the objections be not filed within the thirty days, the letters testamentary issue, of course. And if when filed within the thirty days, the matter is not disposed of at the expiration of that period, if the objecting party prosecute the matter with diligence, the surrogate will still stay the issuing of the letters. The objections should distinctly state every ground of complaint which the objector may have against the granting of the letters to the person applying therefor. They may include any disability comprehended in the above quoted section, numbered 3, and upon any such disability being established, letters must be refused. The above quoted section, numbered 6, simply provides for a bond being taken in the single case of the inadequate security of the person named as executor. And if the objection be on that ground, such particulars as to the situation and value of the estate of the decedent, and the pecuniary circumstances of the executor or executors should be stated as *prima facie*, to render it probable that the estate of the testator will not be safe in their hands.^(w)

Upon filing the objections, the surrogate proceeds to inquire into the same, and if duly prosecuted they operate as a *caveat*, and will stay the issuing of letters until they are removed or dismissed. The practice on the investigation is not pointed out by the statute. It may be *ex parte*, as the statute does not prescribe otherwise; but unless both parties voluntarily appear before the surrogate, the course is for either to obtain an order, requiring the other to appear before the surrogate within a reasonable time, and proceed with the inquiry.

The statute directs, that on filing the affidavit of intention to object, the surrogate "shall stay the granting of letters testamentary for at least thirty days, unless the matter shall be sooner disposed of."^(x) It is clear, therefore, that the matter may be disposed of before the expiration of thirty days; and, no specific time being allowed to file the objections, the whole proceeding is under the control of the surrogate. If

(v) *Wood v. Wood*, 4 Paige, 299.

(w) See *Colegrove v. Horton*, 11 Paige, 263.

(x) Laws 1837, ch. 460, sec. 22.

the executor comes in and demands the exhibition of the objections, and there appears no reasonable ground for delay, it is competent to order the objections to be filed, to hear the allegations of the parties, and determine the case within thirty days.

The parties having appeared, witnesses are examined, the same as in other cases. If the objector fail to appear, the objections will be dismissed, and the letters testamentary will issue. If the person named as executor make default, the surrogate will then inquire into the objections *ex parte*, and decide upon the merits of the same. A decree must be entered in conformity with the surrogate's decision.

(For forms of affidavit, objections, orders to appear, and decree, see Appendix, No. 24.)

Of granting Letters Testamentary to Non-residents.

Sec. 7. If any person, applying for letters testamentary, shall be a non-resident of the state, such letters shall not be granted until the applicant shall give the like bond as is required by law of administrators in cases of intestacy.(y)

(For form of bond, see Appendix, No. 33.)

Of the Executor's Oath.

Sec. 13. Before any letters testamentary shall issue to any executor, he shall take and subscribe an oath or affirmation before the surrogate, or in case of sickness or other inability to attend the surrogate, before any officer authorized to administer oaths, that he will faithfully and honestly discharge the duties of an executor; which oath shall be filed in the office of the surrogate.(z)

By the 59th section of the Act of 1837,(a) the oath of office of executors may be administered by the surrogate, or by any commissioner of deeds or judge of county courts. And by chapter 173 of the Laws of 1849,(b) the clerk or clerks of the surrogate of the county of Kings, appointed in pursuance of that act, and by chapter 201 of the Laws of 1850, the assistants appointed by the surrogate of the county of New York have authority to administer this oath.(c)

This oath is not usually taken until after the will has been proved. As it is prospective in its terms, and as the probate relates to the time of the death of the testator, there would seem to be nothing improper in its being taken, whether the will has been proved or not. The qualification would probably be equally valid after the will had been admitted to probate, although the executor had been sworn in previously. (For form of the executor's oath, see Appendix, No. 27.)

(y) 2 R. S. 70; 4th ed. 256. For form of the bond, see *post*, ch. 4.

(z) 2 R. S. 71; 4th ed. 256. By chapter 223 of the Laws of 1833, p. 306, this oath, in Suffolk county, may be taken before any officer authorized to administer oaths.

(a) S. L. 1837, 534; 2 R. S. (4th ed.) 271, sec. 18.

(b) S. L. 1849, 235; 2 R. S. (4th ed.) 700.

(c) See *ante*, p. 15.

The letters testamentary issue in the name of the people of this state, are tested in the name of the surrogate, and signed by him, and sealed with his seal of office, and are recorded in a book provided for that purpose.(d) A certificate of the record is annexed to the letters.

(For the form of the letters, with the certificate of record, see Appendix, No. 28.)

Limited probates are almost entirely unknown in practice in this state. The court may grant a limited probate, where the testator has limited the executor. And it is laid down, that if a man makes and appoints an executor for one particular thing only, as touching such a statute or bond, and no more, and makes no other executor, he dies intestate as to the residue of his estate, and as to this specialty only shall have an executor, and must have a will proved; but in case he makes another will for the residue of his estate, there must be two wills proved. However, where there is an executor appointed without any limitation, the court can only pronounce for the will, or for an absolute intestacy. It cannot pronounce the deceased to be dead intestate as to the residue, though the executor may eventually be considered only as a trustee for the next of kin. The probate of a will of a *feme covert* should not be general, but limited to the property over which she has a disposing power; and her husband will be entitled to have a grant of administration *ceterorum*.(e)

So, in general cases, if the will be limited to any specific effects of the testator, the probate shall also be so limited, and an *administratio ceterorum* granted.(f)

Of the Executor's Refusal or Acceptance of the Office, and of Renunciation by a Person named as Executor.

The office of executor being a private one of trust, named by the testator, and not by the law, the person nominated may refuse, though he cannot assign the office;(g) and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede.(h)

But though the executor cannot be compelled to accept the executorship, whether he will or not, yet provision is made by the Revised Statutes for summoning the person named as executor before the surrogate, to the intent that he may qualify as executor, or be deemed to have renounced the appointment. The following are the sections of the statute relating to this subject:

Sec. 9. If any person named as executor shall not appear to qualify

(d) 2 R. S. 80, secs. 55, 58; 222, sec. 7. See *ante*, p.

(e) Wms. on Exrs. 314, 316, and cases cited. *Burger v. Hill*, 1 Bradf. Surr. Rep. 360, §74. But letters testamentary issued by the surrogate of the county of New York, of the wills of married women, made under a power, have not heretofore been in anywise different from those issued of the wills of other persons.

(f) Wms. 317; Toller, 68. See, also, as to limited appointment of an executor, *Breath and wife v. Brent*, 3 Dana, 130.

(g) Bac. Abr. Exrs. (E.) 9. See *Douglas v. Forrest*, 4 Bifgh. 704, in the judgment of Best, C. J.

(h) *Doyle v. Blake*, 2 Scho. & Lef. 239. Wms. on Exrs. 225. A person named as executor may delay taking out letters at his pleasure, and unless he has renounced, or objections be taken against him, he will be entitled to them at any time on duly qualifying.

and take upon himself the execution of a will, within thirty days after the same was proved, and shall not have renounced, the surrogate shall, on application of any other executor, or of the widow, or any of the next of kin, or any legatee, or creditor of the testator, issue a summons, directed to such executor, requiring him to appear and qualify, within a certain time therein to be limited, or that, in default thereof, he will be deemed to have renounced the said appointment.(i)

Sec. 10. If the person to whom such summons is directed, reside within this state, it shall be served personally on him, at least fourteen days before the time limited therein for him to appear. And if he reside or be out of the state, or his residence be unknown, such summons may be served by publishing it in the state paper, for at least six weeks before the time therein specified for such person to appear.

Sec. 11. In case sickness or other accident, or any reasonable cause exist, to prevent the attendance of such person, upon the same being proved to the surrogate, he may, in his discretion, allow a further time for such person to appear and qualify.(j)

Sec. 12. If any person so notified shall not appear according to the tenor of such summons, or within the time allowed by the order of the surrogate, and qualify as an executor, by taking an oath and giving a bond, if one shall have been required, he shall be deemed to have renounced the appointment of executor, and the surrogate shall thereupon enter an order, reciting the said summons, the proof of the service thereof, and such subsequent order, allowing time, if any was made, and the neglect of such person to appear and qualify, and declaring and decreeing, that such person has renounced his appointment as such executor.(k)

A party having filed objections to the granting of letters to a person named as executor, may, under these provisions, after the expiration of thirty days from the proving of the will, compel the person named as executor, to appear before the surrogate, and thus determine his qualifications for the duties of executor, or obtain a decree that he has renounced the appointment.

(For forms of application and proceedings under these sections, see Appendix, No. 26.)

Where a legatee or other person interested in the personal property under a will, desires to realize such legacy or interest, and the executor neglects or refuses to prove this will or qualify, he must prove the will before the proper surrogate, according to the provisions of the statutes which were considered in the last preceding chapter,(l) and then obtain a summons, and take proceedings under these sections. If the executor still fails to qualify, he will procure the decree declaring that the executor has renounced his appointment. He will then make an application for the appointment of an administrator with the will annexed.(m)

(i) 2 R. S. 70; 4th ed. 256.

(j) Ibid, 71; 4th ed. 256.

(k) Ibid.

(l) *Ante*, p. 186; S. L. 1837, ch. 460, sec. 4; 2 R. S. (4th ed.) 248, sec. 47.

(m) This is the meaning of the remark of the Chancellor in *Brown v. Brown*, 1 Barb. Ch. Rep. 189, 214, where certain stocks were held in this state by a citizen of another state, at the time of his death, and who died in that state, leaving a will executed there which the

A person named as executor may also decline the office by express renunciation. The statute provides as follows:

Sec. 8. Any person named as executor in a will, may renounce such appointment, by an instrument in writing, under his hand, attested by two witnesses; and on the same being proved to the satisfaction of the surrogate who took proof of the will, it shall be filed and recorded by him.⁽ⁿ⁾

(For form of renunciation, see Appendix, No. 25.) Renunciations and their proofs are recorded by the surrogate in a book by themselves.

An executor cannot in part refuse. He must refuse entirely or not at all.^(o)

The Consequences of Renunciation by an Executor.

An executor who has renounced, may, at any time before the issuing of administration with the will annexed, retract his renunciation.^(p) And in England, even an executor who has renounced in order to become a witness in a suit commenced touching the validity of the will, may, at the termination of such suit, retract his renunciation, and take probate of the will; but this is not done without the consent of all parties in court.^(q)

If a sole executor or each of several executors renounce, and an administrator with the will annexed be appointed, who is removed or dies in the lifetime of the executor, such executor may thereupon retract his renunciation, and will be entitled to letters testamentary. This has been adjudged differently in England, on an objection of the inconvenience which might occur in other quarters from claims of executorship once broken being thus suffered to revive; should the deceased, for instance, have been the surviving executor of other testators, and should administrations have been granted of their effects, on the renunciation of his executors, if the chain of executorship were to revive, there would be double and conflicting representations of such testators; the one by grant of administration, the other by the revived chain of executorship; the law in England still giving authority to an executor of an executor, as such, to administer to the estate of the first testator.^(qq) The law in this state formerly conferred upon an executor of an executor the same authority, but, as has already been noticed,^(r) it was expressly taken away by the Revised Statutes, and the ground of

executors had not proved here, and the Chancellor said, "The only remedy of the complainant, as one of the residuary legatees, if he wished to obtain the proceeds of such stocks and the dividends accrued thereon, after the debts and general legacies of the testator had been paid, was to cite the executors to prove the will, and take out letters testamentary thereon in this state; and if they should neglect to do so, to have himself or some other person appointed administrator with the will annexed."

(n) *Ib.*; 2 R. S. 70; 4th ed. 256.

(o) *Wms. on Exrs.* 232, and cases cited.

(p) *Robertson v. McGeogh*, 11 Paige, 640.

(q) *Wms.* 232, and cases cited.

(qq) *Wms.* 233.

(r) *Ante*, p. 192.

the objection being thus removed, no inconvenience of the kind mentioned can here be alleged in the case in question.^(s)

When there are several executors, and some renounce and one or more take out probate, the renunciation is not peremptory, and such as renounce may, after the death of their co-executors, upon retracting, take out probate.^(t)

The remaining executor may retract his renunciation at any time before the grant of letters testamentary to his co-executors, or in case all have renounced of administration, with the will annexed. But after such grant he cannot retract, so as to entitle himself to letters testamentary, during the lives of the qualifying executors, or of the administrator with the will annexed; and although, after the death of the qualifying executors, or of the administrator with the will annexed, the surviving executor is entitled to come in and retract his renunciation, if he thinks proper so to do, at any time before the granting of administration, *de bonis non*; yet, if he has not retracted, and his renunciation still remains recorded against him, it is not requisite that he should renounce a second time, or that he should be cited, before a good and valid grant of administration, *de bonis non*, to another, can be made. And the executor, after such a grant has been made, cannot procure it to be revoked and obtain a grant of probate to himself, on a retraction of his renunciation, made subsequently to the actual grant of administration, *de bonis non*.^(u)

A decree made by the surrogate on proceedings before him, pursuant to the statute,^(v) that a person named as executor has renounced his appointment, is probably of no greater force to prevent his subsequently taking out letters testamentary, than a voluntary renunciation.

Of Letters Testamentary of the Wills of Foreigners.

It remains to submit some remarks with respect to the granting of letters testamentary of the wills of foreigners and non-residents.

If the testator died without leaving any personal property in this

(s) See *Robertson v. McGeogh*, 11 Paige, 640, 642. But see *Thornton v. Winston*, 4 Leigh, 152. This question is now before the Supreme Court at General Term, in the Third District, in the case of *Boyd v. Davis*, upon an appeal from a decree of the surrogate of the county of Albany, holding that after administration with the will annexed issued, the renunciation of the person named as executor is peremptory, and cannot be retracted, so as to entitle him to letters testamentary after the death or removal of the administrator with the will annexed.

(t) *Judson v. Gibbons*, 5 Wend. 227, per Savage, C. J.; *Robertson v. McGeogh*, 11 Paige, 640; see also *Bodley v. Hulse*, 5 Wend. 313. Mr. Justice Williams, in his treatise, (last edition, p. 234,) says, "Such as refuse, however formally, may, at a subsequent time, come in and administer, and although they have never acted during the lives, they may assume the executorship after the death of their co-executors." In previous editions of this work, the expression was, following Sir Samuel Toller's treatise, p. 45, "at any subsequent time." On the strength of which, as was stated in the first edition of this work, p. 53, in a case before the surrogate of the county of New York, where there were two executors named and one renounced, and the other took out letters testamentary, and the former, a short time afterwards, and in the lifetime of the other, applied for letters; the application was granted and the letters issued. But such a practice probably is not warranted by the authorities. Chief Justice Savage, in *Judson v. Gibbons*, 5 Wend. 227, says that should the executor renounce, "though he cannot in that case take letters testamentary during the life of such as prove the will, yet should he survive them, he is entitled to administration of the estate, and to letters testamentary."

(u) 2 Roberts, 406. See *Wms. on Exrs.* 234-5, and cases cited.

(v) *Ante*, pp. 201, 202.

state, generally speaking, his will need not be proved in any Surrogate's Court here.

But if a foreign executor should find it necessary to institute a suit here, to recover a debt due to his testator, a personal representative must be constituted by the proper Surrogate's Court here, to administer.^(w)

Letters testamentary, issued in another state of the United States, will not sustain a suit brought by the executors, in the courts of this state.^(x) And where two executors are named in a will, and one of them has taken out letters testamentary in this state, and the other has not, the one who has obtained letters here, may sue in his own name alone, without naming the others as a party.^(y) But where the plaintiffs, though executors, appointed in another state, are also the owners, for example, of a bond and mortgage, on which a suit is brought in a court of this state, as residuary legatees, and by purchase of the interest of their co-legatees, the title having thus passed by delivery, though without any written assignment, they may recover in the court of this state, without taking out letters testamentary here.^(z) And it seems that, where an executor, having proved the will of his testator in one state, assigns a chose in action of his testator, a suit may be brought thereon by the assignee in his own name, in another state, without any probate of the will therein, if the law of the latter state permits the assignee of a chose in action to sue in his own name.^(a)

Likewise, if a will be made in a foreign country, and proved there, disposing of personal property in this state, the executor must prove the will here also.^(aa)

All personal property follows the person, and the rights of a person constituted in this state the representative of a party deceased, domiciled in this state, are not limited to the personal property in this state, but extend to such property, wherever locally situate.^(b)

However, the rights of the executor of a testator, domiciled in this state, in respect to property belonging to him in another state or country, can only be enforced, generally, by the procurement of probate, or administration in such other state or foreign country.

It has been seen^(c) that wills of personal estate, duly executed by persons residing out of this state, according to the laws of the state or

(w) See Wms. on Exrs. 301, and cases cited. *Morrell v. Dickey*, 1 John. Ch. Rep. 156; *Williams v. Storrs*, 6 Ib. 353; *Doolittle v. Lewis*, 7 Ib. 47; *Shultz v. Pulver*, 3 Paige, 182; *S. C.*, on appeal, 11 Wend. 572; *McNamara v. Dwyer*, 7 Paige, 239; *Vroom v. Van Horne*, 10 Ib. 556; *Campbell v. Tousey*, 7 Cowen, 64; *Robinson v. Crandall*, 9 Wend. 425; *Story's Conf. of Laws*, 421, sec. 512; *Lawrence v. Lawrence*, 3 Barb. Ch. Rep. 71; *Smith v. Webb*, 1 Barb. Sup. Ct. Rep. 230; *Sedgwick v. Ashburner*, 1 Bradf. Surr. Rep. 115. See, also, *Brown v. Brown*, 1 Barb. Ch. Rep. 189.

(x) 1 Barb. Sup. Ct. Rep. 230. This, perhaps, is not the rule in all the states of this country, although it prevails generally. In North Carolina, probate and letters testamentary issued in South Carolina, authorize executors to sue in the former state. *Stephens v. Smart*, 1 Law Rep. 471. See also cases cited in notes to Wms. on Exrs. (3d American edition) 300, 301.

(y) 3 Barb. Ch. Rep. 71.

(z) 1 Barb. Sup. Ct. Rep. 230.

(a) *Harper v. Buller*, 2 Peters' S. C. U. S. Rep. 239.

(aa) See Wms. 302, and cases cited.

(b) *Ibid.* 303.

(c) *Ante*, p. 178; 2 R. S. 67; 4th ed. 253.

country in which the same were made, may be proved under a commission, to be issued by the Supreme Court; and when so proved, may be established and transmitted to the surrogate having jurisdiction, with directions to such surrogate to issue letters testamentary, or of administration with the will annexed, thereon, in the same manner as upon wills duly proved before him; and that, where a will so executed shall have been duly admitted to probate in such state or country, letters testamentary, or of administration with the will annexed, may also be issued thereon, by the surrogate having jurisdiction, upon the production of a duly exemplified or authenticated copy of such will, under the seal of the court in which the same shall have been proved. It has further, already appeared, that, where a will of personal estate duly executed in this state, by a person not a resident of this state, shall in the first instance have been duly admitted to probate in a court of a foreign state or country, letters testamentary, or of administration, with the will annexed, may be issued thereon, by any surrogate having jurisdiction, upon the production of a duly exemplified or authenticated copy of such will, under the seal of the court in which the same shall have been proved. (d) The statute relative to the granting of letters of administration, provides as follows:

Sec. 31. In all cases where persons, not inhabitants of this state, shall die, leaving assets in this state, if no application for letters of administration be made by a relative entitled thereto, and legally competent, and it shall appear that letters of administration on the same estate, or letters testamentary, have been granted by competent authority, in any other state of the United States, then the person so appointed, on producing such letters, shall be entitled to letters of administration in preference to creditors, or any other persons, except the public administrator in the city of New York. (e)

Under these provisions it has been the practice, upon the production of an exemplified copy of the probate granted by the proper court of the place where the deceased died domiciled, for the Surrogate's Court here to follow the grant upon the application of the executor, in decreeing its own probate and letters testamentary; and this whether the exemplification produced came from a court of another state of the United States, or from a court of a foreign country. (f) The provisions of the

(d) S. L. 1840, 326; 2 R. S. (4th ed.) 178. Letters testamentary, or of administration with the will annexed, are issued under this section, and the will is admitted to probate and record, the same as in cases under sec. 68, (2 R. S. 67,) upon the production of a copy of the will, under the seal of the foreign court or tribunal, without any evidence, further than the seal and the papers themselves, of their authenticity.

(e) See *post*, ch. 4, p. ; 2 R. S. 75; 4th ed. 260.

(f) See *Isham v. Gibbons*, 1 Bradf. Surr. Rep. 69. In *Larper v. Sindrey*, (1 Hagg. 382,) however, Sir J. Nicholl said, that the question, how far other courts of probate were to be governed by the decision of the Court of Probate where the deceased was domiciled, had never been expressly determined. And on a subsequent occasion, in a case where the deceased had died domiciled in India, and probate of the will had been granted at Madras to his widow, as "universal legatee and constructive executrix," the same learned judge pointed out the inconvenience of the practice, and again expressed his doubt how far the court was bound to follow the Indian probate; and he ultimately refused to grant probate to the widow, "as constructive executrix," (in which character she would have been exempted from giving any security,) but allowed administration with the will annexed to pass to her "as relict and principal legatee," upon her giving security. See *Wms. on Exrs.* 308-9.

31st section of the act relative to granting letters of administration, above quoted, seemingly giving a preference to the relatives of the deceased, over the executor appointed by a foreign court, are probably to be understood as really applying only to cases of intestacy; and so much of that section as gives a preference to the public administrator in the city of New York, over "creditors or any other persons," is to be construed also with reference to cases of intestacy alone, and to the provisions of the 27th section of the same act concerning the granting of administration, which gives a preference in cases of intestacy to the public administrator in the city of New York, "after the next of kin" of the intestate, "over creditors and all other persons."^(g)

The rules of law for ascertaining the domicile, are considered in a subsequent part of this work, conjointly with the rule of law as to the distribution of the effects of deceased persons, who have died domiciled in a foreign country.^(h)

If the executor named in the will of a non-inhabitant reside in this state, letters testamentary issue to him upon proof of the will in the Surrogate's Court, or upon the production of the decree of the Supreme Court, where the will has been proved in that court, or of the exemplification of the probate of the will, under the seal of a competent court of another state or of a foreign country, the same as in cases of wills proved originally before the surrogate. If the executor do not reside in this state, he must give security the same as in other cases of non-resident executors.

^(g) The right of the public administrator to administer was formerly expressly limited to cases of intestacy. 1 R. L. 1813, 449, sec. 17, when the chamberlain of the city officiated as public administrator; S. L. 1815, 161; S. L. 1821, 187. And now the statute, (2 R. S. 118,) relative to that officer, applies in terms to cases of intestacy only.

^(h) *Post*, ch. 12.

CHAPTER IV.

OF THE APPOINTMENT OF ADMINISTRATORS.

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| 1. In cases of intestacy. | | 3. Special administrators or collectors. |
| 2. With the will annexed and <i>de bonis non</i> . | | |

IN case a party make no testamentary disposition of his personal property, he is said to die intestate. (a) The custody, management and distribution of the personal property of the intestate is by law committed to an officer called the administrator, who is selected and appointed in the manner now to be shown, and in accordance with the provisions of the statutes presently to be quoted.

In what Surrogate's Court the Letters of Administration shall be obtained.

The statutes provide in respect to the jurisdiction of surrogates to grant administration as follows:

Sec. 23. The surrogate of each county shall have sole and exclusive power, within the county for which he may be appointed, to grant letters of administration of the goods, chattels and credits of persons dying intestate, in the following cases:

1. Where an intestate, at or immediately previous to his death, was an inhabitant of the county of such surrogate, in whatever place such death may have happened;

2. Where an intestate, not being an inhabitant of this state, shall die in the county of such surrogate, leaving assets therein;

3. Where an intestate, not being an inhabitant of this state, shall die out of the state, leaving assets in the county of such surrogate, and in no other county;

4. Where an intestate, not being an inhabitant of this state, shall die out of the state, not leaving assets therein, but assets of such intestate shall thereafter come into the county of such surrogate. (b)

Sec. 24. Whenever an intestate, not being an inhabitant of this state, shall die out of the state, leaving assets in several counties, or assets of such intestate shall after his death come into several counties, the surrogate of any county in which such assets shall be, shall have power to grant letters of administration on the estate of such intestate; but the surrogate who shall first grant letters of administration on such estate, shall be deemed thereby to have acquired sole and exclusive jurisdiction over such estate, and shall be vested with all the powers incidental thereto. (c)

(a) 2 Black. Comm. 494.

(b) 2 R. S. 73; 4th ed. 258. See, also, S. L. 1843, 236, sec. 4; 2 R. S. (4th ed.) 266, sec. 72; *Ante*, p. 175.

(c) The 25th section of the statute provides as follows: "The persons appointed administrators, by the surrogate who shall have first granted letters of administration, in the cases specified in the last section, shall have sole and exclusive authority as such, and shall be entitled to demand and recover from every person subsequently appointed administrator of the same estate, the assets of the deceased in his hands. But all acts in good faith, of such subsequent administrator, done before notice of such previous letters, shall be valid; and all suits commenced by him, may be continued by and in the name of the first administrators. 2 R. S. 73; 4th ed. 258.

The case of a person not an inhabitant of this state, *dying in the county* of the surrogate, and leaving no assets there, but leaving assets in another county; and that of a person not an inhabitant *dying in the county*, leaving no assets, but assets coming into the county after his death, are both unprovided for in terms by these sections of the statute; though, if a non-inhabitant die *out* of the state under these circumstances, the grant of administration is regulated. There cannot, in the nature of things, it has been considered, (d) be any reason why the administration of the assets of a non-inhabitant dying *in* the county, should not belong to the surrogate, as well as that of a non-inhabitant dying *out* of the state. On the contrary, the argument for the power in the former instance, is stronger than in the latter, and the only solution of the difficulty is, that the particular exigencies referred to were not contemplated. Accordingly, it was held (e) that this could not be regarded as anything more than an omission to regulate the power of the several surrogates, which does not in anywise restrict or limit their general authority to grant administration prescribed and conferred by statute. (f) And that, provided the fact be established that assets of the deceased have come into the county of the surrogate since his death, or were here at that time, the surrogate has jurisdiction to grant the administration.

The private property of the Seneca Indians, however, is not within the jurisdiction of the laws of this state respecting administration. It is expressly declared by statute, that no person shall sue or maintain any action on any bond, bill, note, promise or other contract, against any of this and other tribes of Indians within this state. (g) And if the laws have no jurisdiction over their property, the surrogates have no power to grant letters of administration upon it. In respect to the disposition of the property of a deceased Indian, the customs of the nation regulating the distribution of his property among his relatives prevails, and such distribution, according to such customs, passes a good title, which the courts of this state will not disturb. (h)

*To whom General Administration is to be granted, and of the persons
Incompetent to become Administrators.*

The statutes on these subjects provide as follows:

Sec. 27. Administration, in cases of intestacy, shall be granted to the relatives of the deceased, who would be entitled to succeed to his personal estate, if they or any of them will accept the same, in the following order: First, to the widow; second, to the children; third, to the father; fourth, to the brothers; fifth, to the sisters; sixth, to the grandchildren; seventh, to any other of the next of kin who would be entitled to share in the distribution of the estate. If any of the persons so entitled be minors, administration shall be granted to their guardians; if none of the said relatives or guardians will accept the same, then to the creditors of the deceased, and the creditor first applying, if other-

(d) *Köhler v. Knapp*, 1 Bradf. Surr. Rep. 241, 246.

(e) *Ibid*.

(f) 2 R. S. 220; 4th ed. 418, sec. 1; *ante*, p. 208.

(g) 2 R. L. 1813, 153, sec. 2.

(h) *Dole, admr., &c. v. Irish*, 2 Barb. Sup. Ct. Rep. 639.

wise competent, shall be entitled to a preference; if no creditor apply, then to any other person or persons legally competent. But in the city of New York, the public administrator shall have preference after the next of kin, over creditors and all other persons; and in the other counties of this state, the county treasurer shall have preference next after creditors, over all other persons. And in the case of a married woman dying intestate, her husband shall be entitled to administration in preference to any other person, as hereinafter provided.(i)

If the deceased shall have been an illegitimate, and have left a mother, and no child, or descendant, or widow; such mother shall be entitled to letters of administration in exclusion of all other persons, in pursuance of the above provisions of the sixth chapter of the second part of the Revised Statutes. And if the mother of such deceased shall be dead, the relatives of the deceased on the part of the mother shall be entitled to letters of administration in the same order as if the deceased had been legitimate.(j)

Sec. 28. When there shall be several persons of the same degree of kindred to the intestate, entitled to administration, they shall be preferred in the following order: First, males to females; second, relatives of the whole blood to those of the half blood; third, unmarried women to such as are married; and when there are several persons equally entitled to administration, the surrogate may, in his discretion, grant letters to one or more of such persons.(k)

Sec. 29. A husband, as such, if otherwise competent according to law, shall be solely entitled to administration on the estate of his wife, and shall give bonds as other persons, but shall be liable, as administrator, for the debts of his wife, only to the extent of the assets received by him. If he shall not take out letters of administration on her estate, he shall be presumed to have assets in his hands, sufficient to satisfy her debts, and shall be liable therefor: and if he shall die, leaving any assets of his wife unadministered, they shall pass to his executors or administrators, as part of his personal estate, but shall be liable for her debts to her creditors, in preference to the creditors of the husband.(l)

Sec. 31. In all cases, where persons, not inhabitants of this state, shall die, leaving assets in this state, if no application for letters of administration be made by a relative entitled thereto and legally competent, and it shall appear that letters of administration on the same estate, or letters testamentary have been granted by competent authority, in any other state of the United States, then the person so appointed, or producing such letters, shall be entitled to letters of administration in preference to creditors, or any other persons, except the public administrator in the city of New York.(m)

Sec. 32. No letters of administration shall be granted to a person convicted of an infamous crime, nor to any one incapable by law of making a contract, nor to a person not a citizen of the United States,

(i) 2 R. S. 74; 4th ed. 259.

(j) S. L. 1845, chap. 236, p. 257; 2 R. S. (4th ed.) 282, sec. 75, subdv. 8. For this act entire, see *post*, chap. 12.

(k) 2 R. S. 74; 4th ed. 259.

(l) *Ibid.* 2 R. S. 75; 4th ed. 259.

(m) 2 R. S. 75; 4th ed. 260.

(unless such person reside within this state,) nor to any one who is under twenty-one years of age, nor to any person who shall be judged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence, or want of understanding, nor to any married woman; but where a married woman is entitled to administration, the same may be granted to her husband, in her right and behalf.⁽ⁿ⁾

Sec. 33. If any person, who would otherwise be entitled to letters of administration as next of kin, or to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons.^(o)

Sec. 34. Administration may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled to be joined with such person; which consent shall be in writing, and be filed in the office of the surrogate.^(p)

In case of a contest for preference as to administration between relatives whose priority is not settled by the statute, the single point to be ascertained is, who will be entitled to the surplus of the personal estate—"who will be entitled to share in the distribution of the estate." The Statute of Distributions,^(q) in specifying the mode in which the surplus shall be distributed, provides, that "in case there be no widow, no children and no representatives of a child, then the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives." It seems to be fully established, that the construction of the Statute of Distribution, as to the proximity of degrees of kindred, at least, must be according to the rules of the civil law.^(r)

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendantium*," the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.^(s)

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between any given person and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between such given person and his son, grandson, great-grandson, and so downwards in a direct descending line. Every generation in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards; the father of such person is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line; and therefore, universally obtains, as well in the civil and canon, as in the common

(n) Ibid. Letters of administration to the husband, in right of his wife, should be so expressed in the grant.

(o) 2 R. S. 75; 4th ed. 260.

(p) Ibid. 76; 4th ed. 260.

(q) 2 R. S. 97; *Post*, chap. 12.

(r) Williams on Exrs. 344, and cases cited; *Sweeney v. Willis*, 1 Bradf. Surr. Rep. 495.

(s) 2 Black. Comm. 203; Wms on Exrs. 274.

law. This lineal consanguinity, it may be observed, falls strictly within the definition of *vinculum personarum ab eodem stipite descendit*; since lineal relations are such as descend one from the other, and both, of course, from the same common ancestor.^(t)

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such, then, as lineally spring from one and the same ancestor who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.^(u)

It must be carefully remembered, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus, Titius and his brother are related; why? because both are derived from one father: Titius and his first cousin are related; why? because both are descended from the same grandfather: and his second cousin's claim to consanguinity is this; that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived.^(v)

The mode of calculating the degrees in the collateral line, for the purpose of ascertaining who are the next of kin, so as to be entitled in distribution, conforms, as it has been above observed, to that of the civil law; and is as follows: to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending;^(w) or, in other words, to take the sum of the degrees in both lines to the common ancestor.^(x)

(t) 2 Black. Comm. 203; Ib.

(u) 2 Black. Comm. 204.

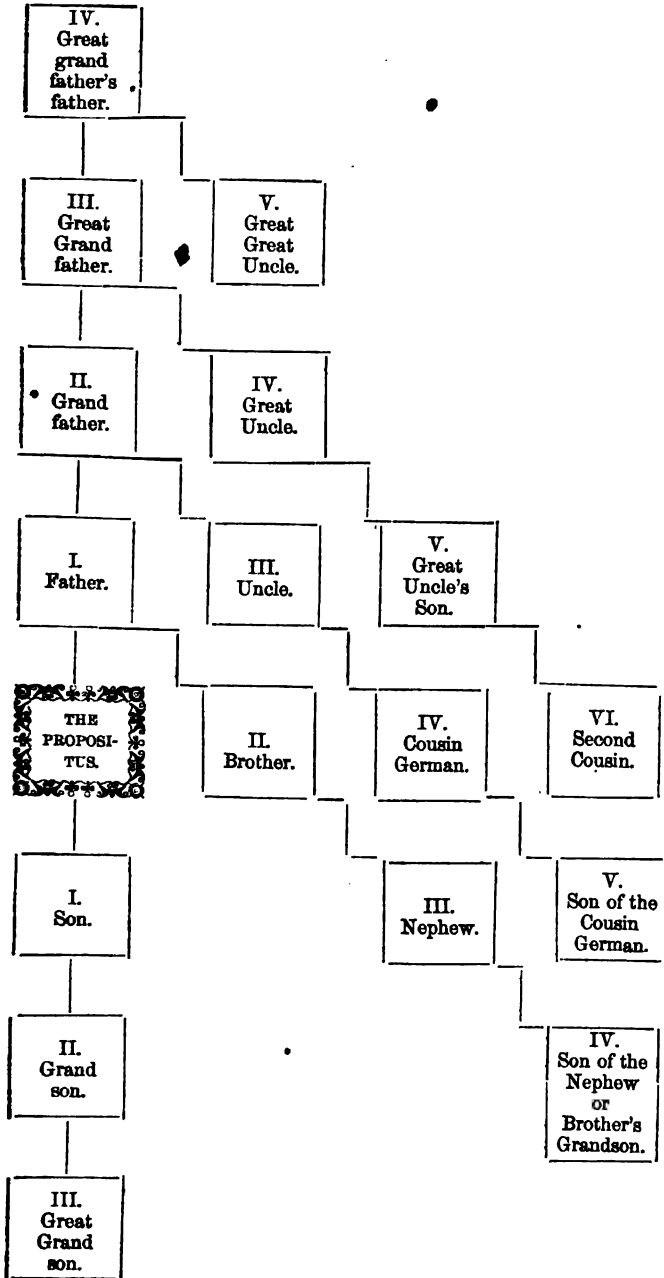
(v) 2 Black. Comm. 205.

(w) 2 Black. Comm. 207; *Mentney v. Petty*, Prec. Chan. 593; Toller, 88.

(x) Ibid. and Mr. Christian's note to 2 Black. 207. According to the canon law, the mode of computation is to begin at the common ancestor, and reckon downwards, and in whatever degree the two persons, or the more remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. It is obvious, that the degrees by this calculation are fewer than by the mode of the civilians; and Sir J. Jekyl, in Prec. Chan. 593, and Lord Hardwicke, in 1 Ves. sen. 335, attribute the establishment of the mode of canonists to this circumstance—inasmuch as the nearer they brought the relation, the greater was their trade of dispensations of marriage. [*]

(*) The distribution of personal property of intestates, in these United States, has undergone considerable modification. In many of them, the English Statute of Distribution, as to personal property, is pretty closely followed. In a majority of the states, the descent of real and personal property is to the same persons, and in the same proportions, and the regulation is the same in substance, as the English Statute of Distributions, with the exception of the widow, as to the real estate, who takes one-third for life only, as dower. The half-blood take equally with the whole blood, as they do under the English Statute of Distributions. Such a uniform rule, in the descent of real and personal property, gives simplicity and symmetry to the whole doctrine of descent. The English Statute of Distributions, being founded in justice, and on the wisdom of ages, and fully and profoundly illustrated by a series of judicial decisions, was well selected, as the most suitable and judicious basis on which to establish our American law of descent and distribution. 3 Kent's Com. 425; 8d ed. *See vide* Ibid. for an able view of the law of descents and distributions in the various states of the Union.

TABLE OF CONSANGUINITY.



In the annexed table of consanguinity, the degrees are computed as far as the sixth. It may be useful to apply some examples from it to the rule of calculation above laid down. The *propositus* and his cousin-german will be found designated in the table as related in the fourth degree—because, following the rule of computation, from the *propositus*, ascending to his father, in one degree; from him to the common ancestor, the grandfather, two; then, descending from the grandfather to the uncle, three; and from the uncle to the cousin-german, four. Again, the second cousin of the *propositus* will be found described in the table, as related in the sixth degree; because, from the *propositus*, ascending to his father, is one degree; from his father to his grandfather, two; from his father to his great-grandfather, the common ancestor, three: then, descending, from the great-grandfather to the great-uncle of the *propositus*, four; from the great-uncle, to the great-uncle's son, five; from his great-uncle's son to his second cousin, six. It will be observed, that kindred are found distant from the *propositus* by an equal number of degrees, although they are relations to him of very different denominations. Thus, a granddaughter of the sister, and a daughter of the intestate's aunt, (*i. e.*, a great-niece and a first cousin,) are in equal degree, being each four degrees removed.^(y)

In the further consideration of the statute, and of this mode of computing proximity of kindred, and the rights to administration derived from it, several remarkable distinctions may be observed, with reference to the corresponding rules of the common law, respecting succession to inheritances.

1st. Relations by the father's side and the mother's side, are in equal degree of kindred; and, therefore, equally entitled to administration: for, in this respect, dignity of blood gives no preference.^(z) Hence, it may happen that relations are distant from the intestate by an equal number of degrees, and equally entitled to the administration of his effects, who are no relations at all to each other.

2d. The half-blood is admitted to administration as well as the whole, for they are kindred of the intestate; but, as between the two, by the statute, it has been observed, the whole blood is to be preferred. However, the brother of the half-blood shall exclude the uncle of the whole blood.^(a)

3d. The right to administration, as prescribed by the statute, will follow the proximity of kindred, though ascendant; and therefore, when a child dies intestate, without wife or child, leaving a father, the father is entitled to the administration of the personal effects of the intestate, as next of kin, exclusive of all others.^(b) So, with respect to the mother, if a child dies intestate without a wife, child or father, it is

^(y) *Thomas v. Keltiche*, 1 Ves. sen. 333; *Thirt v. Robinson*, cited Ambl. 192. So a first cousin twice removed is in the same degree as a second cousin, for they are both in the sixth degree of consanguinity. *Silcox v. Bell*, 1 Sim. & Stu. 301; *Lock v. Lake*, 2 Cas. Temp. Lee, 421. See Wms. on Exrs. 344 to 347.

^(z) *Moor v. Barham*, cited in *Blackborough v. Davis*, 1 P. Wms. 53.

^(a) *Collingwood v. Pace*, 1 Ventr. 424.

^(b) See *Ratcliff's case*, 3 Co. 40 a; *Collingwood v. Pace*, 1 Ventr. 414; *Blackborough v. Davis*, 1 P. Wms. 51.

laid down that the mother is entitled to administration:(c) and before the Statute of 1 Jac. II, ch. 17, she could claim, as next of kin, the whole personal estate; and although now, by the Statute of Distribution,(d) every brother and sister has an equal share with her, yet, being nearer of kin to the intestate by one degree, she is, without doubt, entitled to the preference in administration. Again, if a man dies intestate, leaving no nearer relations than a grandfather or grandmother, and an uncle or aunt, the grandfather or grandmother, being in the second degree, though ascendant, will be entitled to administration to the exclusion of the uncle or aunt, who are related only in the third degree.(e) So a great-grandmother is equally entitled as an aunt.(f)

However, though the law of this state acknowledges the rights of ascendants generally, yet it does not recognize them to the extent of the civil law, according to which, ascendants, of whatever degree, shall be preferred before all collaterals, except in the case of brothers and sisters. But the law here prefers the next of kin, though collateral, before one who, though lineal, is more remote.(g)

. It remains to notice certain exceptions to the rule of computation, above stated, of the proximity of kindred and consequent right to administration.

1st. The parents of an intestate are as near akin to him as his children; for they are both in the first degree: but the statute following and declaring the previous law, expressly gives children the preference. And, although the statute subsequently, in terms, gives the father, brothers and sisters the preference over grandchildren, yet, as it has previously provided that administration "shall be granted to the relatives of the deceased, who would be entitled to succeed to his personal estate,"(h) and as the father, brothers and sisters are utterly excluded from any share in distribution where there are children, or the representatives or descendants of children,(i) grandchildren, notwithstanding the order of preference, so in terms prescribed, are entitled to the administration next after children. The revisers, in their note to the legislature accompanying their recommendation of this provision, cite the previous law, and say, "much simplified, according to the practice and the law, as now understood, and many occasions for contest respecting preferences removed."(j) By the law, as then understood, children and their lineal descendants, to the remotest degree, were entitled to the administration in preference to the father, brother, sister,

(c) *Ratcliff's case*, 3 Co. 40 a, where the well known case of the Duchess of Suffolk, Bro. Admor. pl. 41, *contra*, was denied: S. P. *Collingwood v. Pace*, 1 Ventris, 424, by Hale, C. B. See Wms. on Exrs. 349.

(d) 2 R. S. 97; *Post*, ch 12.

(e) *Mentney v. Petty*, Prec. Chanc. 593; *Blackborough v. Davis*, 1 P. Wms. 41; *S. C.*, 1 Lord Raym. 686; *Woodroff v. Winkworth*, Prec. Chanc. 527; *Sweezy v. Willis*, 1 Bradf. Surr. Rep. 495. See, also, *Bogert v. Furman*, 10 Paige, 496-500.

(f) *Burton v. Sharp*, cited in 1 Lord Raym. 686; 1 P. Wms. 45; *S. C.*, but differently reported as to the facts, Lutw. 1055 *Lloyd v. Tench*, 2 Ves. senr. 215, by Strange, M. R. See, also, Wms. on Exrs. 349.

(g) 1 P. Wms. 51, by Lord Holt; *Stanley v. Stanley*, 1 Atk. 458, by Lord Hardwicke; *Sweezy v. Willis*, 1 Bradf. Surr. Rep. 498, by Bradford, Surr.

(h) See *The Public Administrator v. Peters*, 1 Bradf. Surr. Rep. 100, 101.

(i) 2 R. S. 97.

(j) See 3 R. & O. S., (2d ed.,) Appendix, p. 636.

or any other relative of the intestate.^(k) Such clearly is the construction to be given to the present statute.^(l)

2d. Where the nearest relations, according to the above computation, are a grandfather or grandmother, and brothers or sisters of the intestate, although these are all related in the second degree, yet the latter are entitled to the administration to the exclusion of the former.^(m)

To recapitulate, in the first place, the widow, then the children, and their lineal descendants to the remotest degree; and on failure of children, the parents of the deceased are entitled to the administration: then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly, cousins.⁽ⁿ⁾

A more particular discussion of some parts of the present subject, will be found in a subsequent part of this treatise, where the rights of the next of kin of an intestate, under the Statute of Distributions, are considered.^(o)

Under the statute, it is not every relative of the deceased who is entitled to administration of his estate; but, as has been seen, administration goes, as a matter of right, "to the relatives of the deceased *who would be entitled to succeed to his personal estate*"—or, as the language is in another portion of the section, the next of kin *who would be entitled to share in the distribution of the estate*. Interest is a necessary qualification; and, among those who have an interest, the statute establishes a certain order. If there be not any such relatives or next of kin so entitled, then creditors and the public administrator in the city of New York have the right to the administration. A relative who has not any interest in the estate, is not only *quoad hoc*, a stranger, but, for purposes of administration, he has no more title to administer, than one who is not a relative. After the next of kin who have an interest, the statute brings in the public administrator in the city of New York. Thus, where the intestate left her father and her half-brothers her only next of kin, and a half-brother cited her father under the statute,^(p) and he did not appear, and the letters were then issued to the half-brother; it was held that, as the father was, by the Statute of Distributions, entitled to the whole surplus after the payment of the debts, he was therefore the only relative or next of kin entitled to administration; that his refusal did not give the half-brother any right to the administration, as he had not any interest in the estate of the intestate, and never could have directly in his own right; and that the letters (the case arising in the county of New York) ought to have been

(k) *Carter v. Crawley*, Sir T. Raym. 500; *Evelyn v. Evelyn*, Ambl. 504.

(l) It might be a matter of curious inquiry, whether the revisers did not report, or intend to report, the word "grandparents," instead of the word "grandchildren," in this connection, in the section. This would have made the section, as they intimate they intended it should be, "according to the practice and the law, as now understood." See the enumeration of the order of preference of administration, 2 Kent's Comm. 413; 7th ed. 505.

(m) *Evelyn v. Evelyn*, 3 Atk. 762; *S. C.*, Ambl. 191; *Winchelsea v. Norcliff*, Freeman Chan. Cas. 95; *S. C.*, 1 Vern. 403; 2 Chan. Rep. 374, 376; *Blackborough v. Davis*, 1 P. Wms. 45.

(n) See 2 Black. Comm. 505; Wms. on Exrs. 350.

(o) *Post*, ch. 12.

(p) 2 R. S. 76; *Infra*.

issued to the public administrator; and, he not having been cited, that the previous letters should be revoked, and the administration committed to him.(g) It was further held, in the same case, that the relatives who have an interest, as such, are those living at the period of the intestate's death, and having at that time a title to a distributive share; and if a relative so entitled happen to die, the right to administer dies with him. His legal representatives will receive his distributive share, not as next of kin of the first intestate, but by right of administration on the estate of the second intestate.

Where there are several persons equally entitled to administration, the surrogate, by the above 28th section of the statute, has the right of election; but this discretion is to be exercised in subservience to some rule. Where there is no material objection on the one hand, or reasons for preference on the other, the court puts the administration into the hands of that person amongst those of the same degree of kindred, with whom the majority of parties interested are desirous of entrusting the estate.(r) And where, between two or more individuals of the same class, an objection lies against one, on the ground of moral fitness, the surrogate may properly take that into consideration, in determining to whom the administration shall be committed.(s)

The several provisions of the statute above recited, giving the right of administration of the personal property of a married woman, dying intestate, to her husband, are not repealed or affected by the recent acts of the legislature, "for the more effectual protection of the property of married women."(t) Besides these provisions, expressly authorizing the husband to administer upon the estate of his deceased wife intestate, the statute further provides, that if the husband shall die, "leaving any assets of his wife unadministered, they shall pass to his executors or administrators as part of his personal estate;"(u) and "if letters of administration on the estate of a married woman shall be granted to any other person than her husband, by reason of his neglect, refusal or incompetency to take the same, such administrator shall account for and pay over the assets remaining in his hands, after the payment of debts to such husband or his personal representatives."(v) And by the Statute of Distribution, it is enacted, that the "provisions respecting the distribution of estates, shall not apply to the personal estates of married women; but their husbands may demand, recover and enjoy the same as they are entitled by the rules of the common law."(w) By the original act, "for the more effectual protection of the property of married women,"(x) it was provided, that the real and personal property of any female who may hereafter marry, and which she shall own at the time of her marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be

(g) *The Public Administrator v. Peters*, 1 Bradf. Surr. Rep. 100. See, also, *McCosker v. Golden*, Ib. 64-5.

(r) *Peters v. The Public Administrator*, 1 Bradf. Surr. Rep. 200, 207.

(s) *Coope v. Lowerre*, 1 Barb. Ch. Rep. 45, per Walworth, Ch.

(t) S. L. 1848, ch. 200, p. 307; S. L. 1849, ch. 375, p. 528; 2 R. S. (4th ed.) 331.

(u) 2 R. S. 75; 4th ed. 259, sec. 29.

(v) Ib. sec. 30.

(w) 2 R. S. 98; 4th ed. 283, sec. 86, (sec. 79.)

(x) S. L. 1848, 307; 2 R. S. (4th ed.) 331.

liable for his debts, and shall continue her sole and separate property, as if she were a single female; and that the real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted. And by that act, as amended,^(y) "any married female may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts."

These acts do not undertake to disturb the law in regard to the estates of married women dying intestate. They are authorized to take, hold, convey and devise, but, in default of a will, the estate is transmitted after death, precisely as it was before these acts were passed. A married woman may sell or bequeath her personal estate; but, if she dies intestate, the law declares who shall take it. Now, as before, if she dies intestate, the husband may demand administration; or, if a stranger administer, he is entitled to the residue after payment of debts—and, as to him, the Statute of Distributions is a nullity. That statute does not apply to the case of a *feme covert* dying intestate. It has been determined in several cases in England, that where separate property of the wife,^(z) or property held under marriage articles for her sole and separate use, as if she were unmarried,^(a) was left undisposed of, by will or otherwise, by the wife at her death; the quality of separate property ceased at her death, and the husband was entitled *jure mariti*, and as her administrator, and not as her next of kin. A settlement of property to the use of a *feme covert*, with the same power and control as if she were sole and unmarried, is an approximation by marriage, as nearly as may be, to the state of her personality, as settled by the acts of 1848 and 1849; and these English decisions are, therefore, clearly in point. Accordingly these acts, which have enabled a married woman to have the sole control and absolute ownership of her property during her life, with power to sell and convey, and also to regulate its disposition after her death, have not at all altered the law as to the administration of her personalty in case of intestacy. Where the wife has failed to exercise the privilege conferred upon her by these new statutes, and dies intestate, possessed of personalty, her husband has still the sole right to administer, and, as administrator, to retain the residue of the estate, after the payment of debts, to his own use. The right of representation, unless he be incompetent, and the right of succession to the property, are still exclusively vested in him, to be defeated only by a valid will.^(b) The husband, therefore, is still entitled, in the first instance, to administration of the goods, &c., of his

(y) S. L. 1849, 528; 2 R. S. (4th ed.) 331.

(z) *Moloney v. Kennedy*, 10 Simon, 254.

(a) *Proudley v. Fielder*, 2 M. & K. 57. See, also, *Salmon v. Hays*, 4 Hagg. 386.

(b) Per Bradford, Surrogate, in *McCosker v. Golden*, 1 Bradf. Surr. Rep. 64, 68, 69.

deceased wife intestate. If the husband intermeddles with the deceased wife's estate, without taking out letters of administration, the above 29th section of the statute makes him liable for her debts, upon the presumption that he has assets belonging to her estate to pay them.(c)

If the husband survives the wife, and dies either before or after taking out letters of administration of her estate, leaving any assets of his wife unadministered, the above 29th section directs that they shall pass to his executors or administrators, "but shall be liable for her debts to her creditors in preference to the creditors of the husband." The object of this provision was not that, where the husband survived the wife, her property, which unquestionably belonged to the representatives of the husband, should go to such representatives after paying her debts, provided they, or some other person, administered on her estate specially; the last clause, giving her creditors a preference, is wholly senseless in any such view of the section. Without doubt the legislature intended, in such a case, that the personal representatives of the surviving husband, in their character of such representatives, should acquire the right to her whole property unadministered, and should have power to sue for, and recover it, as such representatives of the surviving husband. But, after the assets have been recovered by them, they must so administer them, as to give her creditors a preference in payment out of that part of the estate; although it comes to them in the character of the personal representatives of the husband. There were two questions of some doubt existing before the Revised Statutes:—1. Whether the assets of the wife were liable for her debts, where her husband survived her, or were to belong absolutely to the husband's representatives, as a part of his personal estate: 2. Whether his representatives, or the next of kin of the wife, were to administer on her estate. And both questions were put at rest by giving the property directly to his representatives, as a part of his personal estate; but chargeable in their hands with her debts, to the extent of that part of the fund.(d)

The rule, it seems, is, that where the husband and wife are drowned in the same ship, they must be presumed to have perished at the same moment, unless proof can be obtained as to the exact time of the death of either.(e) Hence, in such cases, in order to entitle the husband to the wife's property, it must be proved that he survived her, and consequently, the administration thereof must be granted to her next of kin, if his representatives cannot give any such proof.(f)

In the case of a foreigner dying intestate in this state, it should seem, according to English authority, that if no question is raised, the court will grant administration to the person entitled to the effects of the de-

(c) See *Lockwood v. Stockholm*, 11 Paige, 92.

(d) *Lockwood v. Stockholm*, 11 Paige, 87, 91, 92; *Renwick v. Renwick*, 10 Paige, 415, 420. See, also, 2 Kent's Comm. (7th ed.) 116, where it seems to be considered that an administration of the estate of the wife, on the part of the representatives of the husband, is required by the statute.

(e) *In the Goods of Schorn*, 3 Hagg. 748; 1 Curt. 705; 2 Kent's Comm. 434, 435; 7th ed. 538, and cases cited; *Wms. on Exrs.* 340, 727, 1036, and cases cited.

(f) *Satterthwaite v. Powell*, 1 Curt. 705; *Wms.* 340.

ceased, according to the law of his own country.^(g) If the legal title be disputed, the question will depend on the fact, whether the deceased was domiciled within this state, or only a temporary resident there.

If the intestate was domiciled in a foreign country, or in another state, and left assets in this state, administration must be taken out here, as well as in the country or state of domicil.^(h)

The above section, numbered 31, gives the right of administration of the goods, &c., of a deceased non-inhabitant, in the first instance, to his relatives. Since the distribution of the personal property of the intestate in such cases is to be regulated according to the law of the country or state in which he was a domiciled inhabitant at the time of his death,⁽ⁱ⁾ it appears to be a necessary consequence that the grant should be made to a relative entitled to the effects of the deceased according to the law of that country or state. If the person applying be a relative, and prove a grant of administration to himself by the proper authority of the domicil of the deceased, he will have the strongest claim to the administration here. In case no relative apply for the administration on the estate of the deceased non-inhabitant, and it appears that letters of administration on the same estate, or letters testamentary, have been granted, by competent authority, in another state of the United States, then the person so appointed, on producing such letters, is entitled to letters of administration in preference to creditors or any other persons, except the public administrator in the city of New York. It will be observed that this provision expressly entitles the administrator or executor appointed in another state of the United States only to administration here, and gives the public administrator in the city of New York the preference over such administrator or executor in that case only. If the deceased was a domiciled inhabitant of a foreign country, and no relative apply for the administration, if the party applying for administration here has already obtained a grant in the proper court of the country where the domicil was, it is presumed that the court here, generally speaking, would follow that grant.^(j) It is proper to remark, that in the office of the surrogate of the county of New York, a practice has long existed of granting administration of the goods, &c., of deceased non-inhabitants leaving no relatives in this state, to the personal representatives or the agent or attorney in fact of the personal representatives of the deceased, appointed in another state, or in a foreign country,^(k) as well as of issuing letters testamentary of the wills of non-inhabitants to the executors named in such wills.

(g) Wms. on Executors, 354, and cases cited. The regular course seems to be, that the ambassador should certify the law of the country he represents. *Ib.* n.

(h) See *ante*, pp. 176, 177, and cases cited; Wms. 355.

(i) See *post*, ch. 12.

(j) See Wms. on Exrs. 355.

(k) *St. Jurjo v. Dunscomb and Beckwith*, 2 Bradf. Surr. Rep. 105. Where a party applied for administration, as the agent of a foreigner resident abroad, and entitled to administration, the application cannot be supported, without exhibiting to the court a proper authority from the person so entitled. See Wms. on Exrs. 355, n.

WHO ARE INCAPABLE OF BEING ADMINISTRATORS

Who are Incapable of being Administrators.

A widow, or next of kin, who would otherwise be entitled, may be incapable of the office of administrator, on account of some legal disqualification.

The incapacities of an administrator are enumerated in the above thirty-second section of the statute. Under the twenty-seventh section of the statute, already considered, which prescribes the order in which administration shall be granted to the relatives of the deceased, if they or any of them will accept the same; and under this thirty-second section, which provides that letters of administration shall not be granted to a person *convicted* of an infamous crime, nor to any one incapable by law of making a contract, nor to a non-resident alien, nor to a minor, nor to any one who shall be adjudged incompetent, by the surrogate, to execute the duties of such trust by reason of drunkenness, *improvidence*, or want of understanding, nor to a married woman; the surrogate has no discretion to exclude a person, declared by the statute to be entitled to a preference, except for some of the causes specified in this section. No degree of legal or moral guilt or delinquency is sufficient to exclude a person from the administration, as the next of kin in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime. And the conviction intended by the statute is upon an indictment, or other criminal proceeding.^(m) The improvidence contemplated by the statute, as a ground of exclusion, is that want of care or foresight in the management of property, which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value, by improvidence, in case administration thereof should be committed to the person charged as improvident. Accordingly, where the parties applying for the administration, where a son of the intestate and the husband of a daughter in right of his wife, and the latter resisted the claim of the former on the ground that he was disqualified, on account of his vices and his improvidence, and there was proof against the son of divers offences against the laws of society, and of a large recovery against him in an action of *crim. con.*, it was held that such evidence was not relevant under the statute, and ought to have been excluded; and although there was evidence derived from his own examination, when he was applying for the benefit of the insolvent act, tending to show improvidence in the acquisition and preservation of property, and proving that he was grossly negligent in the management of his property and affairs, and in the contracting of debts by indorsing for strangers, or for men without visible means of payment; yet, after all, it was concluded that he was not improvident to such a degree as to render him incompetent to discharge the duty of an administrator.⁽ⁿ⁾

The insolvency of the applicant is not a sufficient reason to adjudge him incompetent to be an administrator. Insolvency is not always

^(m) *Coope v. Louverre*, 1 Barb. Ch. Rep. 45; *Harrison v. McMahon*, 1 Bradf. Surr. Rep. 283; *McMahon v. Harrison*, 10 Barb. Sup. Ct. Rep. 659.

⁽ⁿ⁾ *Coope v. Louverre*, 1 Barb. Ch. Rep. 45, 49. See, also, *Emerson v. Bowers*, 14 Barb. S. C. Rep. 658.

evidence of improvidence or want of prudence. Misfortune will often overtake and ruin the most provident and prudent; and especially is insolvency not a reason for exclusion where the application is for a joint administration with one or more, conceded to be competent.(o) Nor is the fact that the party applying is indebted to the estate a ground of exclusion.(p)

But a professional gambler is disqualified to act as administrator by reason of improvidence.(q)

Of the Proceedings on taking out Letters of Administration.

The statutory directions are as follows:

Sec. 26. Before any letters of administration shall be granted on the estate of any person who shall have died intestate, the fact of such person's dying intestate shall be proved to the satisfaction of the surrogate; who shall examine the persons applying for such letters, on oath, touching the time, place and manner of the death, and whether or not the party dying left any will; and he may also, in like manner, examine any other person, and may compel such person to attend as a witness for that purpose.(r)

Sec. 35. When any person shall apply for administration, either with the will annexed or in case of intestacy, and there shall be any other person having prior right to such administration, the applicant shall produce, prove and file with the surrogate a written renunciation of the persons having such prior right. If he fail to do so before any such letters shall be granted, a citation shall be issued to all persons having such prior right, to show cause, at a day therein to be specified, why administration should not be granted to such applicant.(s)

Sec. 36. If any person to whom such citation shall be directed, shall reside within the county of such surrogate, such citation shall be served personally, or by leaving a copy at the residence of such person, at least six days before the return day thereof. If any such person reside out of such county, but within the state, and such residence can be ascertained, service shall be made in the same manner, at least forty days before the return day of the citation. If any such person reside out of the state, or his residence cannot be ascertained, such citation may be personally served without the state forty days before its return, or may be published once in each week, for six weeks successively, in the state paper.

Sec. 37. In all cases of application for letters of administration in cases of intestacy, a citation to show cause as aforesaid, shall be issued to, and served on, the attorney-general, at least twenty days before

(o) *In the Matter of the estate of William Post, deceased*, Law of Surrogates, &c., (1st ed.) appendix, p. 1. It is stated in that decision, that in a case of joint administration, "it is necessary for the administrators to join in every act, and no one joint administrator has the control of the property of the intestate," which probably is not strictly correct.

(p) *In the Matter of the estate of William Post, deceased*, *Supra*; *Churchill v. Prescott*, 2 Bradf. Surr. Rep. 304.

(q) *McMahon v. Harrison*, 10 Barb. Sup. Ct. Rep. 659. Affirmed in the Court of Appeals, 2 Selden, 443.

(r) 2 R. S. 74; 4th ed. 259.

(s) 2 R. S. 76; 4th ed. 260.

the return day thereof, previous to granting such letters, unless it shall be shown to the surrogate, by the affidavit of the applicant or other written proof, that the intestate left kindred entitled to his estate, specifying the names of such kindred and their places of residence, as far as the same can be ascertained.

Sec. 42. Every person appointed administrator shall, before receiving letters, execute a bond to the people of this state, with two or more competent sureties, to be approved by the surrogate, and to be jointly and severally bound. The penalty in such bond shall not be less than twice the value of the personal estate of which the deceased died possessed, which value shall be ascertained by the surrogate, by the examination on oath of the party applying, and of every other person he may think proper to examine. The bond shall be conditioned, that such administrator shall faithfully execute the trust reposed in him as such, and also that he shall obey all orders of surrogate touching the administration of the estate committed to him.(f)

The proceeding on taking out letters of administration, is by petition of the person desiring to administer. The above quoted sections, numbered 26 and 42, require the surrogate to examine the person applying for the letters on oath, touching the fact of intestacy,(u) and the time, place and manner of the death, and the value of the personal property of the intestate; but it is deemed a sufficient compliance with these sections, to embody in the petition the facts and circumstances directed by them to be inquired into.

The petition should also show jurisdiction in the surrogate, under one or the other of the clauses of the 23d section, of the statute already considered, declaring to what surrogate the power of granting the administration belongs. It should, in addition, set forth, that the intestate left kindred entitled to his estate, specifying the names of such kindred and their places of residence, as in default of proof as to these, by the above section, numbered 37, a citation must issue to the attorney-general to show cause. The surrogate must take proof as to the names and residence of the kindred, in order to ascertain, also, whether the person applying is first entitled to the letters, or whether a citation must not issue. And accordingly the degree of relationship of such kindred should be stated in the petition, and if any of them be minors it should be so set forth, and whether such minors have a general guardian; because the guardian of one of the next of kin, a minor, by the 33d section of the statute,(v) is entitled to the administration, where the minor is otherwise entitled. Besides, there may be other persons having an equal right with the petitioner to the letters, and the surrogate is entitled to have this information respecting the next of kin, in order properly, in such a case, to exercise his discretion to whom he shall grant the letters.(w) And in such a case a majority in interest, if practicable, ought to join in the petition, or give their consent to its prayer. If the intestate has left a widow, her name and residence, and

(f) 2 R. S. 77; 4th ed. 261.

(u) See *Bulkley v. Redmond*, 2 Bradf. Surr. Rep. 281.

(v) *Supra*, p. 211.

(w) See *Taylor v. Delancey*, *Caines' Cases*, 149.

whether she is of full age or a minor, should be set forth.(x) If he has not left a widow, that fact should be stated. The prayer of the petition should be, that letters of administration of the goods, chattels and credits of the deceased be granted to the petitioner. If there are persons having a prior right to the petitioner to letters, who have not renounced, a proper prayer for a citation ought to be included. If it be proposed to join another person with the petitioner in the administration, the prayer will be that letters may be granted to the petitioner and such person, and this will be a sufficient consent that such person be joined in the administration, to be filed with the surrogate under the above section, numbered 34. If a married woman be entitled to letters, the same are to be granted to her husband in her right and behalf, and the husband and wife ought both to join in the petition, that the evidence of the necessary facts may be more complete than it would be if the husband, a stranger, perhaps, to the deceased and to the estate, alone petitioned.

The petition must be under oath, and must be sworn to before the surrogate. (For forms of petitions, both where the petitioner is first entitled and when there are others having a prior right, see Appendix, No. 29.) If it be necessary to take out a citation, the proper order for issuing the citation must be entered. (For form of the order and of the citation, see Appendix, No. 30.)

The person entitled to the administration may, under the 34th section of the statute heretofore recited,(y) on filing the proper consent, have another person, although the latter is not entitled, joined with him in the administration, and the privilege is not confined to him first entitled. If several having a prior right renounce or fail to appear, on the return of the citation, to show cause, the person having the next right may doubtless, upon filing the proper consent, have a person not entitled joined with him in the administration. (For form of the consent, see Appendix, No. 31.) But a person not entitled to administration cannot be joined as administrator with one who is entitled, on the suggestion of the surrogate, and without or against the consent of the party entitled.(z) And there is no provision authorizing the surrogate to appoint a person sole administrator who is not entitled, except on the renunciation or refusal of all those having the prior right. Thus, when there are children, it is not regular to appoint a stranger sole administrator on the petition of the widow to that effect, even if the children be minors, although this has not unfrequently been done. The widow and another person may, with her consent, be joined in the administration; but her petition that such other person be alone appointed, will not authorize the granting of letters.

Where a person remotely entitled applies for letters of administration, he must produce, prove, and file with the surrogate, the written renunciation of all persons having the prior right, or, in default thereof, must cause them to be cited to show cause. (For form of renunciation and proof, see Appendix, No. 32.) It seems that, where a party entitled

(x) See *Carow v. Mowatt*, 2 Edw. Ch. Rep. 51.

(y) *Supra*, p. 211.

(z) *Peters v. The Public Administrator*, 1 Bradf. Surr. Rep. 200.

to the grant of administration has renounced, such renunciation may be retracted before the letters of administration have finally issued.(a) Frequently a clause is inserted in the renunciation, stating that the party renounces in favor of another person, and praying the surrogate to appoint such person administrator. If such person be next entitled to the administration, the letters will, of course, issue to him; but if this be not so, he must procure the renunciation of all having the prior right. If the widow renounce or refuse, the children and next of kin, according to the 27th section of the statute, are entitled. If the widow and all the next of kin renounce or refuse, then, in the city of New York, the public administrator, and in the other parts of the state, the creditor, becomes entitled. If they all renounce, then a stranger, or out of the city of New York, the county treasurer, may be appointed. And the relatives or next of kin who must renounce, are those only who would be entitled to succeed to the personal estate. Thus, if the intestate leave no widow or children, but leave a father and brothers and sisters, the father's renunciation alone will be sufficient to let in creditors or the public administrator; because, in such a case, the father is solely entitled to the personal property of his deceased child.(b) But when the intestate leaves a widow and children, or other next of kin, the renunciation of the widow, although accompanied with a prayer that J. K., a stranger, be appointed, does not give J. K. any right to the administration. Even if the widow and all the next of kin renounce, and pray the appointment of a stranger, he does not become entitled; because the section above referred to expressly declares, that if none of the relatives or their guardians will accept the administration, then the same shall be granted to the public administrator, or to creditors, or to the county treasurer, as the case may be. It would seem obvious that the right of the public administrator, or the creditors, or the county treasurer, to be appointed administrator of the goods, &c., of the intestate, cannot be superseded by the nomination of another person to the office, by those having the prior right and refusing the trust. The rule, however, has been different, and very often administration has been granted to a stranger, or the widow alone, or the widow and the next of kin, or where there may have been no widow, the next of kin renouncing, as it is termed, in his favor, without regard to the claims of the public administrator or of creditors. It is clear, notwithstanding, that such appointments have been as irregular as though, in a case where there were a widow and children, all competent, a child had been appointed administrator without the renunciation or consent of the widow.(c)

If the person having the right to the administration be a minor, his guardian, by the 33d section of the statute, is entitled to the letters; and if the person applying for the letters be remotely entitled, and there are minors having no guardians possessing the prior right, such minors should be duly served with a citation to show cause; and on the hearing of the matter, their interests should be taken care of by a

(a) See Wms. on Exrs. 372, and cases cited.

(b) See Statute of Distribution, 2 R. S. 96; Post, ch. 12; *Public Administrator v. Peters*, 1 Bradf. Surr. Rep. 100.

(c) See 1 Bradf. Surr. Rep. 100.

special guardian, and the proceedings in respect to them should be similar to those for the protection of the rights of the minors, on an accounting by an executor or administrator before a surrogate, or on the revocation of a probate; as to which the reader is referred to the appropriate chapters of this work.(d) If the minor have a guardian, the citation must be duly served upon him. Where the appointment of a person as guardian is invalid, his subsequent appointment as administrator of his ward's father will also be erroneous, if his claim to be appointed administrator rests upon the fact that he has been appointed guardian, and is entitled to administer in the right of his ward; and letters have been issued to him, without any citation or notice to relatives having a prior right to the administration.(e)

As has been seen, a creditor cannot obtain letters of administration from the surrogate of the county of New York, without producing the renunciation not only of the widow and next of kin, but of the public administrator also, or causing them all to be cited to show cause.

The obtaining of letters of administration is not often attended with litigation. The fact that the decedent died intestate must be proved before letters of administration issue; and that is ordinarily shown by establishing that no will can be found.(f) The principal object to be attained, is the faithful and honest administration of the property which is intended to be secured by the official bond of the administrator; and those interested in the estate usually take little further concern in the matter, than to see to the ability and good standing of the sureties. The bond must be acknowledged or proved by the parties executing the same. The statutory provision is as follows:

Sec. 3. All bonds given by any executor or administrator, or any other person, which by law are required to be filed with the surrogate, or in the surrogate's office, of any county, shall be proved or acknowledged by the parties executing the same, as deeds are now required by law to be proved or acknowledged, before the same shall be received by the surrogate or person performing the duties of surrogate.(g)

(For form of an administrator's bond, see Appendix, No. 33.)

Where there are several administrators, the statute requiring the surrogate, upon the appointment of administrators, to take from every administrator a bond with surety, &c., is complied with by taking one joint and several bond from all the administrators, with surety.(h)

If there be contending claims for the administration, the surrogate proceeds to hear the testimony of the parties as in other cases, and thereon decides upon their relative titles to the letters. If the person seeking the administration labor under any of the disabilities specified in the 32d section of the statute above considered, his application must be denied. The pecuniary responsibility of the persons offered as sureties, may be inquired into by an examination before the surrogate, at the instance of any party interested in the estate; and this is quite frequently a subject of investigation on granting administration. The

(d) See *post*, chs. 12 and 14.

(e) *White v. Pomeroy*, 7 Barb. Sup. Ct. Rep. 640.

(f) *Burkley v. Redmond*, 2 Bradf. Surr. Rep. 281.

(g) S. L. 1851, 332; 2 R. S. (4th ed.) 423.

(h) See *Kirby v. Turner*, Hopk. 309.

surrogate, before he will approve of the bond, will, in nearly all cases, require the sureties to justify in the amount of its penalty.

An administrator, like an executor,⁽ⁱ⁾ is a sworn officer. The Revised Statutes provide as follows:

Sec. 41. Before any letters of administration, with the will annexed, or in cases of intestacy, shall be issued to any administrator or collector, he shall take and subscribe an oath or affirmation before the surrogate, or in case of sickness or other inability to attend the surrogate, before any officer authorized to administer oaths, that he will, well, honestly and faithfully, discharge the duty of administrator or collector, as the case may be, according to law.^(j)

By the 59th section of the law of 1837,^(k) the oath of office of executors and administrators may be administered by the surrogate, or by any commissioner of deeds or judge of county courts.

And by chapter 173 of the Laws of 1849,^(l) the clerk or clerks of the surrogate of the county of Kings, appointed in pursuance of that act; and by chapter 201 of the Laws of 1850, the assistants appointed by the surrogate of the county of New York have authority to administer this oath.^(m)

The oath is annexed to the proceedings, and filed with the surrogate. (For form of the oath, see Appendix, No. 34.) An order for the issuing of the letters must be entered; for form of which, see Appendix, No. 35. (For form of the letters, see Appendix, No. 36.)

The letters of administration issue in the name of the people of this state, are tested in the name of the surrogate, signed by him, and sealed with his seal of office, and are recorded in a book provided for that purpose.⁽ⁿ⁾ There is not any law or practice in this state limiting the time within which letters of administration of the goods, &c., of an intestate must be taken out after his death.

Of granting Administration with the Will annexed, and Administration de bonis non.

The granting of administration with the will annexed has been incidentally adverted to in the preceding pages, whilst considering the subject of administration in cases of intestacy.

The Revised Statutes provide as follows:

Sec. 14. If all the persons named in a will as executors, shall renounce, or after summons issued and served as aforesaid,^(o) shall neglect to qualify, or shall be legally incompetent, then letters testamentary shall issue, and administration with the will annexed be granted, as if no executors were named in such will, to the residuary

(i) See *ante*, p. 200.

(j) 2 R. S. 77; 4th ed. 261. In Suffolk county, the oath may be taken before any officer authorized to administer oaths. S. L. 1833, ch. 223, p. 306.

(k) S. L. 1837, 534; 2 R. S. (4th ed.) 271, sec. 18.

(l) S. L. 1849, 235; 2 R. S. (4th ed.) 700.

(m) See *ante*, p. 15.

(n) 2 R. S. 80, secs. 55, 58; Ib. 222, sec. 7.

(o) Pursuant to secs. 9, 10, 11, 12, 2 R. S. 70, 71, (4th ed. 256,) heretofore fully considered, (*Ante*, pp. 201, 202,) providing that where an executor fails to qualify for thirty days after proof of the will, he may be summoned, and, on default, be decreed by the surrogate to have renounced.

legatees, or some or one of them, if there be any ; if there be none that will accept, then to any principal or specific legatee, if there be any ; if there be none that will accept, then to the widow and next of kin of the testator, or to any creditor of the testator, in the same manner, and under the like regulations and restrictions, as letters of administration in case of intestacy.(p)

The 21st section of the statute provides, that, if after proceedings(q) to supersede an executor to whom letters testamentary have been granted, on the ground that he has become incompetent, or that his circumstances are precarious, such person shall neglect to give the bond required by the statute—or, if it appear that he is legally incompetent to serve as executor, the surrogate shall, by order, supersede the letters testamentary so issued to such person, whose authority and rights as an executor shall thereupon cease ; and if there be no acting executor of such will, the surrogate shall grant letters of administration with the will annexed, of the assets of the deceased left unadministered, as provided by the statute.(r)

In case a sole executor or administrator, or all of several executors or administrators, to whom letters testamentary or of administration shall have been granted, shall die, become lunatic, convict of an infamous offence, or otherwise become incapable of executing the trust reposed in him or them, or in case his or their power and authority, shall be revoked or annulled according to law, the surrogate having authority to grant letters originally, issues letters of administration upon the goods, chattels, credits and effects of the deceased left unadministered, with the will annexed or otherwise, as the case may be, to the widow or next of kin, or creditors of the deceased, or others, in the same manner as directed in relation to original letters of administration ; which administrator must give bonds in the like penalty, with like sureties and conditions as required of administrators, and has the like power and authority. And such letters supersede all former and other letters testamentary and of administration upon the same estate.(s)

The 19th section of the article of the Revised Statutes, relative to the duties of executors and administrators, in taking and returning inventories,(t) provides that, if the summons to appear and return an inventory cannot be served personally, by reason of the executor or administrator absconding or concealing himself, or, if after having been committed to prison for default, in not returning an inventory, such executor or administrator shall neglect for thirty days to make and return such inventory, the surrogate may thereupon issue, under his seal of office, a revocation of the letters testamentary or letters of administration before granted to such executor or administrator, reciting therein the cause of such revocation ; and shall grant letters of administration of the goods, chattels and effects of the deceased unadministered, to the person entitled thereto, (other than such executor or adminis-

(p) 2 R. S. 71, sec. 14 ; 4th ed. 256.

(q) Under secs. 18, 19, 20, 2 R. S. 72, (4th ed. 257,) hereinafter fully considered. See ch. 14.

(r) See 2 R. S. 72 ; 4th ed. 257, sec. 21.

(s) 2 R. S. 78 ; 4th ed. 262, secs. 44, 45.

(t) 2 R. S. 81 ; 4th ed. 268, 271 ; *Post* ch. 7.

trator,) in the same manner as original letters of administration or letters testamentary.

Sec. 20. Such letters of administration or letters testamentary shall supersede all former letters, and shall deprive the former executor or administrator of all power, authority and control over the personal estate of the deceased; and shall entitle the person appointed by such letters, to take, demand and receive the goods and effects of the deceased, wherever the same may be found.^(u)

The proceedings on obtaining letters of administration with the will annexed, or letters of administration of the goods, &c., left unadministered by a former executor or administrator, as appears by these provisions of the statute, must be similar to those on obtaining original letters of administration. The petition in the case of an application for letters of administration of the goods, &c., left unadministered by a former administrator, should contain the like statements as to jurisdiction, the death of the intestate, the value of the personal property, and the names, residences and majority or minority of the widow and next of kin, as are required in the petition for administration in the first instance, and in addition should set forth the death or removal from office of the former administrator. In the case of an application for letters of administration with the will annexed, the petition should properly aver jurisdiction, and should set forth the will, or distinctly and fully refer to the same. It should state, also, the renunciation or neglect to qualify of the persons named as executors, or the death or removal from office of the executors. If the applicant be the sole residuary legatee, it is not necessary to give any facts as to the other legatee, or as to the relatives; but if there be several residuary legatees, or the applicant be a specific or general legatee, the names and residences of the other legatees, and the other necessary facts respecting them, ought to be given; and, in general, on an application for letters of administration *de bonis non*, or with the will annexed, the names and residences, and the fact of the majority or minority of all those having an equal or prior right, and the value of the personal property, ought to be set forth. (For form of petition, see Appendix, No. 37.) Those having a prior right must renounce or be cited, and a stranger may be joined in the administration, with the consent of the person entitled, in the same manner as in cases of granting original letters of administration. Before letters of administration, with the will annexed, can be issued, the person entitled and applying must give a bond, with sureties, in the same manner as an administrator, in case of intestacy. Such bond is required, as well of a residuary principal or specific legatee, as of the widow or next of kin or creditor. The 43d section of the statute, above considered, provides that "every person appointed administrator shall, before receiving letters, execute a bond to the people of this state, with two or more competent sureties, to be approved by the surrogate," &c. The word, administrator, here used, is sufficiently broad and comprehensive to embrace every kind of administrator; so that the direction, requiring "every person appointed administrator" to execute a bond of necessity, includes an ad-

^(u) 2 B. S. 85; 4th ed. 271.

ministrator with the will annexed.(v) And the 45th section of the statute, above quoted, expressly requiring such bond and surety in the cases therein specified, would seem to leave no doubt on the point. Investigations relative to contending claims, to disabilities, and to the competency of the sureties, are to be conducted in the same manner as on granting original letters. A similar oath must be taken by the administrator, and a similar order for the issuing of the letters must be entered.

In the case of a foreign will, it is the usage to grant administration with the will annexed to the attorney in fact of the foreign executor. If there be no one authorized to apply as such attorney, letters issue according to the statute, to the legatees, widow, and next of kin. The grant of administration is regulated by the law of the place where the assets are situated.(w)

The letters of administration with the will annexed, issue in the name of the people of this state, and are tested, sealed, signed and recorded the same as letters testamentary or of administration in the first instance. (For form of the letters, see Appendix, No. 38.)

Sec. 22. In all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators, with such will, shall have the rights and powers, and be subject to the same duties, as if they had been named executors in such will.(x)

Letters of administration with the will annexed of the goods, &c., left unadministered by the executor, or of administration of the goods, &c., left unadministered by a former administrator, are in all respects the same as original letters in either case, except that they commit to the administrators with the will annexed, or to the new administrator, the administration of all and singular the goods, chattels and credits of the deceased left unadministered by such executor or former administrator, and recite also his death or removal from office.

In general, the term "administrator," in the statutes relative to the estates of deceased persons, includes "administrators with the will annexed;" and the latter are subject to all the provisions applicable to administrators generally, except so far as the distribution of the estate is directed by the will.(y)

Of granting Letters of Collection.

The statutory provision is as follows:

Sec. 38. In case of a contest relative to the proof of a will, or relative to granting letters testamentary or of administration with the will annexed, or of administration in case of intestacy, or when, by reason of absence from this state of any executor named in a will, or for any other cause, a delay is necessarily produced in granting such letters, the surrogate authorized to grant the same may, in his discretion, issue

(v) *Ex parte Brown*, 2 Bradf. Surr. Rep. 22.

(w) *St. Jurjo v. Dunscomb and Beckwith*, 2 Bradf. Surr. Rep. 105.

(x) 2 R. S. 72; 4th ed. 258.

(y) *Ex parte Brown*, 2 Bradf. Surr. Rep. 22.

special letters of administration, authorizing the preservation and collection of the goods of the deceased.(z)

Letters of collection are seldom issued, except where there is a necessary delay in proving a will. The surrogate has unrestricted discretion, both as to issuing the letters and to whom the same shall be granted. If there be a will, they are usually granted to one or more of the executors named therein. The petition should set forth the cause of the delay in proving the will, and the facts which render it necessary that special letters should be issued.

If from due cause a delay is necessarily produced in granting letters of administration, the surrogate will, on a proper application setting forth such cause and the necessity for special administration, appoint a collector. In the county of New York, in such cases, the public administrator has commonly been selected.

Before the letters are granted, the collector takes an oath or affirmation before the surrogate, or in case of sickness or other inability to attend the surrogate, before any officer authorized to administer oaths, that he will well, honestly and faithfully discharge the duty of collector, according to law.(a) The clerk of the surrogate of the county of Kings, and the assistants appointed by the surrogate of the county of New York, also have authority to administer this oath.(b) The oath is filed with the surrogate.

The collector must give security the same as an administrator. The statute provides as follows:

Sec. 43. Every collector appointed by special letters, shall execute a bond with sureties, to be approved by the surrogate, in the same penalty as in the case of an administrator, and the same proceedings shall be had to ascertain such penalty. The condition of such bond shall be, that he will make a true and perfect inventory of such of the assets of the deceased as shall come to his possession or knowledge, and return the same, within three months, to the office of the surrogate granting such letters; that he will faithfully and truly account for all property, money, and things in action, received by him as such collector, whenever required by the said surrogate, or any other court of competent authority, and will faithfully deliver up the same to the person or persons who shall be appointed executors or administrators of the deceased, or to such other person as shall be authorized to receive the same by the surrogate.(c)

An order for issuing the letters, reciting that the necessity for issuing them has been proved, should be entered. (For forms of petition, order and collector's bond, see Appendix, No. 39.)

The letters issue in the name of the people of this state, and are tested, sealed, signed and recorded the same as letters testamentary or of administration. (For form, see Appendix, No. 40.)

Special administrations issued in pursuance of the above quoted sections of the statutes, are the only limited or temporary administrations distinctly recognized by the existing law. Administrators *durante*

(z) S. L. 1837, 528, sec. 23; 2 R. S. (4th ed.) 261.

(a) 2 R. S. 77; 4th ed. 261, sec. 41. See *ante*, p. 227.

(b) S. L. 1849, 235; 2 R. S. (4th ed.) 700; S. L. 1850, 384.

(c) 2 R. S. 77; 4th ed. 262.

minore ætate, *pendente lite*, or *durante absentia*, can be appointed under these provisions only. If the person otherwise entitled to letters of administration, or to letters of administration with the will annexed, be a minor, his guardian, as has appeared, is entitled to the letters, and there is no provision limiting the trust of such an administrator to the minority of the person in whose right he has been appointed. If, therefore, the person entitled come of age before the completion of the administration, it may be doubted whether that fact alone would be a sufficient reason for removing the party from his trust. In *Carow v. Mowatt*,^(d) the court say, "Whenever the right to administration devolves upon an infant, the proper course is, to grant administration to his guardian, or to some other person, *durante minore ætate*." But this case seems to have arisen before the Revised Statutes.

Administration limited to any particular object, as in respect to a bond or certain funds, or for any particular purpose, as to bring or defend a suit, are nowhere expressly authorized. An administrator once appointed, is entitled to the entire administration, and is accountable for the same. If the executor named be under age or be absent, letters of collection must be taken out, and not letters of administration with the will annexed; and in a case where the person solely entitled to the administration is a minor, letters of collection, which might be continued *durante minore ætate*, instead of proper letters of administration, may, it is presumed, be granted.

CHAPTER V.

OF THE CONTROL OVER THE ESTATE BEFORE PROBATE, OR ADMINISTRATION GRANTED.

THE interest of an executor in the estate of the deceased is derived exclusively from the will, and it vests in the executor from the moment of the testator's death. The probate is merely operative as the authenticated evidence, and not at all as the foundation of the executor's title. And as the executor derives all his interest from the will itself, and that interest is completely vested at the moment of the testator's death, the probate, when produced, is said to have relation to the time of the testator's death.^(a)

And formerly, upon these principles, it was held, that the executor, before he proved the will, might do almost all the acts which are incident to the office, except only some of those which relate to suits, and he might maintain a suit in his representative character if, when he declared, he was prepared to make profert of the letters testamentary.^(b)

(d) 2 Edw. Ch. Rep. 57, 60.

(a) Wms. on Exrs. 239, and cases cited.

(b) Ib. 240; Toller on Exrs. 44; *Vroom v. Van Horne*, 10 Paige, 549.

But now, by statute, the authority of the executor before probate is expressly limited. The Revised Statutes provide as follows:

Sec. 16. No executor named in a will shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, except to pay funeral charges, nor to interfere with such estate in any manner, further than is necessary for its preservation.(c)

Under this provision the executor may, if necessary, before probate, defray the funeral expenses of the deceased,(d) and cause his goods to be stored, or take any other proper measures for their safety; and his reasonable disbursements made for these purposes will be a just claim against the estate.

But the right to interfere for the purpose of preserving the estate, does not authorize suits to recover debts due to the testator. The statute provides for the case of delay in obtaining letters testamentary, and allows the appointment of a collector, who may maintain suits as administrator.(e) If the goods of the testator are taken from the executor before probate of the will, he may maintain trespass, trover or replevin, on his own possession; and, in such a case, he is not obliged to make proof of the letters testamentary.(ee) The will alone does not give the executors the right to sue—they can only acquire it by proving the will. If they are not executors at the time the suit is commenced, letters subsequently obtained will not aid them by relation. The statute has introduced a new rule by taking away the common law right to sue before probate.(f) Nor may the executor pay a legacy, or make advances on account of a legacy, before probate; and if he do, and afterwards take probate, and the probate be annulled, such payments or advancements will not be allowed on the settlement of his accounts.(ff)

A payment of a debt due the testator to a person named as executor, who afterwards takes probate, is doubtless good. The probate would be held to relate back, and the executor under its authority would not be permitted to recover what he had once collected without such authority. But if a party indebted to the testator pay to one of two or more persons named as executors, and such person afterwards refuses to qualify, or is declared incompetent, the debtor would probably still remain liable for the debt to the executor or executors who might qualify. There would be great risk that a payment under such circumstances would not be protected.

With respect to an administrator, the rule is, that a party entitled to administration can do nothing, as administrator, before letters of administration are granted to him; inasmuch as he derives his authority, not like an executor, from the will, but entirely from the appointment of the surrogate. He acquires his title to the property of the deceased wholly from such appointment: he has none until the letters of

(c) 2 R. S. 71; 4th ed. 257.

(d) With respect to the payment of funeral charges, see *post*, ch. 10.

(e) See *ante*, p. 231.

(ee) See *Valentine v. Jackson*, 9 Wen. 302.

(f) *Thomas v. Cameron*, 16 Wen. 580, 581.

(ff) *In the Matter of the estate of Dorothea Brinckerhoff, deceased*, Law of Surr. Appendix, 3.

administration are granted, and the property of the deceased vests in him only from the time of the grant.(g)

But this proposition respecting the vesting of the administrator's interest, must be taken with some qualification, for it seems clear, that for particular purposes, as well to secure the estate of the deceased, as for the protection of persons dealing with parties entitled to the administration, who afterwards assume such administration, the letters relate back to the time of the death of the intestate, and not to the time of granting them. Thus, an administrator may have an action of trespass or trover for the goods of the intestate, taken by one, before the letters granted unto him, otherwise there would be no remedy for this wrong done.(h) On the other hand, if a party entitled to the administration receive payment of a debt due to the intestate, and afterwards administer, although in conjunction with another person, the letters of administration relate back, and legalize the payment;(i) and in such a case the administrator and his sureties would be held responsible for all the property of the intestate which might come into his hands, whether he received the same before or after the grant of the administration.

The provision of the statute authorizing the surrogate to issue letters of collection, furnishes every facility for all proper interference with the estate of the deceased, before the granting of letters testamentary or of administration; and persons who were indebted to the deceased, cannot exercise too much caution before dealing with a party claiming to be his personal representative, in satisfying themselves of his authority. Although the party have the strongest presumptive title to the executorship or the administration, a debtor to the deceased is not justified in paying his debt to him. Unless such party afterwards obtain probate or administration, the debtor will not be discharged, and the executor or administrator actually appointed may compel a repayment. The rule may sometimes work an apparent hardship, but its justice is unquestionable and well settled.

If, however, the decedent was a non-resident, the courts of this state, appear to have considered the probate of the will, or the grant of letters testamentary, or of administration, in the proper tribunal of the decedent's domicile, as sufficient to authorize the executor or administrator to take charge of the property here, or to receive debts due to the decedent in this state, when there is no conflicting grant here, and where it can be done without suit.(j) Although such foreign personal representative cannot, in his representative character, maintain an action in the courts of this state, yet he may discharge a debt on a voluntary payment. An executor or administrator of a creditor dying in another state, and becoming lawfully possessed, as a part of his assets, of a bond, given and secured by a mortgage upon lands in this state, is competent, according to a pretty decided opinion expressed by Chancellor Kent, to receive payment, and give an acquittance for the debt, without first

(g) See *Wms. on Exra.* 332, 527; *Valentine v. Jackson*, 9 Wend. 302.

(h) *Ib.* 433; *Babcock v. Booth*, 2 Hill, 181; *Valentine v. Jackson*, 9 Wend. 302.

(i) *Priest v. Watkins*, 2 Hill, 225; *Vroom v. Van Horne*, 10 Paige, 549. And see *Gottberger v. Smith*, 2 Bradf. Surr. Rep. 86.

(j) *Vroom v. Van Horne*, 10 Paige, 549, 556-7, and cases cited. See, also, *Brown v. Brown*, 1 Barb. Ch. Rep. 189.

clothing himself with the office of an executor or administrator, under the judicial authority of this state.(j) But the adoption of such a principle is not without its difficulties, particularly in view of the claims of creditors in this state.

The Revised Statutes make the following provisions with respect to the recovery of the property of deceased persons, taken without authority:

Sec. 78. [Sec. 60.] Every person who shall take into his possession any of the assets of any testator or intestate, without being thereto duly authorized as executor, administrator or collector, or without authority from the executor, administrator or collector, shall be liable to account for the full value of such assets to every person entitled thereto, and shall not be allowed to retain or deduct from such assets for any debt due to him.(k)

Sec. 17. No person shall be liable to an action as executor of his own wrong, for having received, taken, or interfered with, the property or effects of a deceased person; but shall be responsible as a wrong-doer, in the proper action to the executors, or general or special administrators of such deceased person, for the value of any property or effects so taken or received, and for all damages caused by his acts to the estate of the deceased.(l)

CHAPTER VI.

OF THE INTEREST OF THE EXECUTOR OR ADMINISTRATOR IN THE ESTATE OF THE DECEASED, INCLUDING THE SUBJECT OF THE INTEREST AND RIGHTS OF THE *DONEE MORTIS CAUSA*.

THE interest which an executor or administrator has in the goods of the deceased, is very different from the absolute, proper and ordinary interest which every one has in his own proper goods: for an executor or administrator has estate as such *in autre droit* merely, viz., as the minister or dispenser of the goods of the dead.(a)

Upon this principle, in England, if the executor or administrator becomes bankrupt, with any property in his possession belonging to the testator or intestate, distinguishable from the general mass of his own property, it is not distributable under the commission of bankruptcy. The commissioners cannot seize even money which specifically can be distinguished and ascertained to belong to the deceased, and not to the bankrupt himself.(b) The same rule, doubtless, applies

(j) *Doolittle v. Lewis*, 7 John. Ch. Rep. 49. See, also, *Williams v. Storrs*, 6 John. Ch. Rep. 353; *Vroom v. Van Horne*, 10 Paige, 549; *Lawrence v. Lawrence*, 3 Barb. Ch. Rep. 71; *Stevens v. Gaylord*, 11 Mass. Rep. 256.

(k) 2 R. S. 81; 4th ed. 267

(l) *Ib.* 449; 4th ed. 691.

(a) *Wms. on Exrs.* 532.

(b) *Wms. on Exrs.* 533.

to assignments made under bankrupt or insolvent laws in force in this state.

Again, the goods of a testator in the hands of his executor, cannot be seized in execution of a judgment against the executor in his own right. So, if an executor dies indebted, leaving to his executor goods which he had as executor, these are not assets liable to the payment of his debts, but only for the payment of the first testator's. And, since no man can bequeath anything but what he has to his own use, an executor cannot, by his will, dispose of any of the goods which he had as executor to a legatee, and an administrator cannot transmit any interest in the property of the intestate to his own personal representative.(c)

But, generally speaking, an executor or administrator, in his own lifetime, may dispose of and alien the assets of the testator; he has absolute power over them for that purpose, and they cannot be followed by the creditors of the deceased.(d) This rule, however, is subject to some qualifications, which will be hereafter, in part at least, considered in the course of the remarks in this work relative to the power of executors and administrators.

With reference to the possession in *auter droit*, it has been held, that if an executor or administrator grant *omnia bona sua*, the goods of the deceased will not pass unless the grantor have no goods but as executor or administrator. So, if an executor releases all actions, suits and demands whatsoever, which he had for any cause whatever, this extends only to such as he has in his own right, and not to such as he hath as executor.(e)

After the administration is granted, the interest of the administrator in the property of the deceased, is equal to, and with, the interest of an executor. Executors and administrators differ in little else than in the manner of their constitution.(f)

The general rule is, that all goods and chattels, real and personal, go to the executor or administrator. "By the laws of this realm," says Swinburne, "as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to do with the lands, tenements and hereditaments." In other words, it may be stated, that, both at law and equity, the whole personal estate of the deceased vests in the executor or administrator.(g) Executors and administrators, by statute, in this state, may obtain authority, and may be compelled to mortgage, lease or sell the real estate of their testator or intestate, for the payment of his debts; but this is an innovation on the old law, and is not to be considered as altering or extending the established functions of the executor or administrator, except as expressly prescribed by the statute; and, of this, more fully hereafter.(h)

The personal property in which the deceased had but a joint estate or possession, will survive to his companion, and his executor or ad-

(c) Wma. on Exrs. 535, 539.

(d) Ib. 540.

(e) Ib. 540.

(f) Ib. 546.

(g) Ib. 546.

(h) See *post*, ch. 13.

ministrator will not be entitled to a moiety of it, for a survivorship holds place regularly, as well between joint tenants of goods and chattels in possession, or in right, as between joint tenants of inheritance or freehold. But the wares, merchandise, debts or duties, which joint merchants have, as joint merchants or partners, shall not survive, but shall go to the executors of the deceased; and this is *per legem mercatoriam*, which is part of the laws of this state, for the advancement or continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatories pro beneficio commercii locum non habet*. And this part of the *lex mercatoria* has been extended to all traders, and, as it should seem, to all persons engaged in joint undertakings in the nature of trade.⁽ⁱ⁾

The property generally which shall be deemed assets, and go to the executor or administrator, in this state, is particularly specified and described by statute. In view of the design and purposes of this work, the subject has reference, in the first instance, to the making and filing of the inventory, and the duty of the executor or administrator in respect to the same, and it is accordingly postponed until the inventory comes to be treated of. And there are various particulars relative to the estate of the executor or administrator, its quality and quantity, which would fall within the scope of a professedly more extended treatise on the law of executors and administrators, but which cannot be discussed in these pages, except incidentally to the statutory regulations governing those officers.

If there be several executors or administrators, they are regarded in the light of an individual person. They have a joint and entire interest in the effects of the testator or intestate, including chattels real, which is incapable of being divided; and in case of death, such interest shall vest in the survivor, without any new grant by the court.^(j) Consequently, if one of two executors or administrators grant or release his interest in the testator's or intestate's estate to the other, nothing shall pass; because each was possessed of the whole before. So, if one of several executors release but his part of his debt, it has been held, that the whole is discharged.^(k)

If a man appoint several executors, they are esteemed in law but as one person representing the testator; and acts done by any one of them, which relate to the delivery, gift, sale or release of the testator's goods, are deemed the acts of all. Thus, a term of years passes by the assignment of one; and if one release a debt, it is good, and binds the rest. And thus, it was held, that one of two executors might pledge or assign a note as collateral security, for the purpose of being collected and applied to the satisfaction of a judgment obtained against the estate of the testator.^(l) And even securities taken by executors, as such, may be sold or disposed of by one of them, without the others uniting in the act of transfer. Thus, where there was a power of sale to two

(i) See Wms. on Exrs. 547; *Egberts v. Wood*, 3 Paige, 517, 525; *Wilder v. Keeler*, 3 Paige, 166, 172.

(j) See 2 R. S. 78, sec. 44.

(k) Wms. 777, and cases cited.

(l) *Wheeler v. Wheeler*, 9 Cowen, 34. See, also, *Saunders' heirs v. Saunders' executors*, 2 Litt. 315.

executors, "for the more equal and easy division of the estate of the testator," and the executors sold certain real estate of the testator, and took back a bond and mortgage, for a part of the purchase money, by their names and descriptions as executors of the last will and testament of the testator; and subsequently one of the executors, without the assent or knowledge of his co-executor, sold and assigned the bond and mortgage, and there was no proof of fraud or collusion between the assignee and the executor—it was held, overruling a judgment of the Chancellor, that the assignee acquired a valid title to the bond and mortgage.^(ll)

A release of a debt by two administrators, without the concurrence of a third administrator, is good, and the dissent of the third forms no objection to its validity. Executors and administrators stand on the same ground; their liabilities and responsibilities, and their rights, interests and authority, over the estate of the deceased, are the same.^(m)

A release of a debt, on a compromise with the debtor, executed by the administrators, though contrary to the wishes of one-third of those entitled to distribution, will not be set aside where there is no fraud or collusion shown between the debtor and the administrators.^(mm)

Since several executors have a joint and entire interest in all the goods of their testator, including chattels real, it follows, that the act of one, in possessing himself of the effects, is the act of the others, so as to entitle them to a joint interest in possession, and a joint right of action, if they are afterwards taken away.⁽ⁿ⁾

Again, since several executors or administrators have a joint and entire interest in the estate in action of the deceased, it follows that they cannot maintain an action in right of the deceased, upon a contract made by the defendant jointly with one of themselves. Therefore, to an action of assumpsit by several executors, it was held a good plea in bar, that the promises were made by the defendant jointly with one of the plaintiffs; and Mr. Justice Buller said, "the promise was made jointly with one of the plaintiffs: how can he sue himself in a court of law? it is impossible to say a man can sue himself."^(o)

An administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, &c., which remain in specie, and were not administered by the first executor or administrator. Also, it is holden, that if an executor receives money in right of his testator, and lays it up by itself, and dies intestate, this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects, as goods in specie.^(p)

If the original executor or administrator has fraudulently aliened

(ll) *Bogart v. Hertell*, 4 Hill, 492; *S. C.*, 9 Paige, 52.

(m) *Murray v. Blatchford*, 1 Wen. 583.

(mm) *Murray v. Blatchford*, 1 Wen. 583.

(n) Wms. 778.

(o) Wms. 779; *Moffat v. Van Millingen*, 2 Bos. & Pull. 124, note (c); *S. C.*, 2 Chitt. 539; *Fitzgerald v. Boehm*, 6 B. Moore, 332. See, also, *Rose v. Poulton*, 2 B. & Adol. 822.

(p) Wms. 781.

the assets for his own use, in collusion with the vendee, such assets will be considered, at all events in equity, as unadministered, and will consequently pass as such to the administrator *de bonis non*; who in that character may apply to a court of equity to have the sale set aside, and to have the legal estate conveyed to him.(g)

And there are other particulars concerning the estates and interests of executors, administrators and administrators *de bonis non*, which will be treated of hereafter, in connection with the other subjects more directly within the scope and limits of this work, but which cannot, consistently with its general design, be separately considered.

It is deemed proper in this place to direct attention to the species of interest in the property of the deceased, which is created by a donation *mortis causa*.

"A *donatio mortis causa* is thus defined in the civil law, from which both the doctrine and the denomination are borrowed: '*Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat ut si quid humanitus ei contigisset, haberet is, qui accepit; sin autem supervixisset is qui donavit, receperet; vel si eum donationis pœnituisse; aut prior decesserit is, cui donatum sit.*'(r)

"From this definition it results, that to constitute a *donatio mortis causa*, there must be two attributes: 1. The gift must be with a view to the donor's death. 2. It must be conditioned to take effect only on the death of the donor, by his existing disorder. A third essential quality is required by our law, which, according to some authorities, was not necessary according to the Roman and civil law, viz.: 3. There must be a delivery of the subject of the donation.(s)

"1. The gift must be made with a view to the donor's death. If a gift be not made by the donor in peril of death, *i. e.*, with relation to his decease, by illness affecting him at the time of the gift, it cannot be supported as a donation *mortis causa*. Where it appears that the donation was made whilst the donor was ill, and only a few days or weeks before his death, it will be presumed that the gift was made in contemplation of death, and in the donor's last illness.(t)

"2. The gift must be conditioned to take effect only on the death of the donor by his existing disorder. But, although it is an essential incident to a donation *mortis causa*, that it be subject to a condition, that if the donor live the thing shall be restored to him, yet it is not necessary that the donor should expressly declare that the gift is to be accompanied by such a condition; for if a gift be made during the donor's last illness, the law infers the condition, that the donee is to hold the donation only in case the donor die of that indisposition.(u)

"3. There must be a delivery of the subject of the donation. The general rule upon this head is, that to substantiate the gift, there must

(g) Wms. 783.

(r) Wms. 650; Inst. lib. 10, tit. 7; *Tate v. Hilbert*, 2 Ves. jun. 119; *Hedges v. Hedges*, Prec Chan. 269.

(s) Wms 650.

(t) Ib. 651.

(u) Ib.

be an *actual* tradition, or delivery of the thing to the donee himself, or to some one else, for the donee's use. The possession of it must be transferred in point of fact. The purse, the ring, the jewel, or the watch, must be given into the hands of the donee, either by the donor himself, or by his order. Thus, in *Bunn v. Markham*,^(v) Sir G. Clifton had written upon the parcels, containing the property in question, the names of the parties for whom they were intended, and had requested his natural son to see the property delivered to the donees. It was, therefore, manifestly his intention that it should pass to them; yet, as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift.

"So, where the testator, in his last illness, executed and delivered to his sister, a deed of a farm, on which she and her husband resided, and at the same time said, as one witness testified, 'he had some farming tools and other personal property on the premises that was of no use to him, and never would be, and he would give it to her,' and named over some of the property; or, as another witness testified, 'there is some property on these premises that may be of some service to you, but never will be to me, as I know of: I will give it to you.' And this took place at the residence of the testator, fourteen or fifteen miles from the farm conveyed by the deed and the property in question—most of the latter being on the farm where a portion of it had been for some years, it was held that the testator's sister did not acquire any title to the personal property on the farm, and that, in an action by the executors of the testator to recover possession of such personal property, they were entitled to recover.^(vv)

"A further requisite to give effect to the donation is, that the deceased should, at the time of the delivery, not only part with the possession, but also with the dominion over the subject of the gift.^(w)

"But it is no objection that the gift was not made to the donee free from incumbrance, but charged with the performance of a particular purpose. Accordingly, it was held, in a late case,^(x) that a gift may be good as a *donatio mortis causa*, although it be coupled with a trust that the donee shall provide for the funeral of the donor.

"Again, though a delivery to a third party for the donee's use may be good, yet a mere delivery to an agent, in the character of an agent for the giver, is not sufficient.^(y)

"But there are cases where the nature of the thing will not admit of a corporeal delivery; and then, it should seem, that a delivery of the *means* of coming at the possession, or making use of the thing given, will be sufficient. Thus, the delivery of the key of a trunk has been decided to amount to the delivery of a trunk and its contents. So, the delivery of a key of a warehouse, or other place, in which goods of bulk were deposited, has been determined to be a valid delivery of the goods, for the purpose of a *donatio mortis causa*. But in these cases, it is to be observed, that the key is not to be considered in

(v) 7 Taunt. 231; S. C., 2 Marsh. 532.

(vv) *Huntington v. Gilmore*, 16 Barb. Sup. Ct. Rep. 243.

(w) Wms. 654.

(x) *Hills v. Hills*, 8 M. & W. 401.

(y) Wms. on Exrs. 655.

the light of a symbol in the name of the thing itself; but the delivery of it has been allowed as the delivery of the possession, because it is the way of coming at the possession, or to make use of the thing.^(z)

"So, a bond may be a subject of a *donatio mortis causa*, because the property is considered to pass by the delivery. The same has been decided with respect to bank notes, because the property is transferred by the delivery. And, on the same principle, it should seem, that all negotiable instruments which require nothing more than delivery to pass to the donee the money secured by them, may be the subjects of donations *mortis causa*. For, since it has been so adjudged of bank notes, there appears no reason why exchequer notes, or promissory notes, payable to the bearer, or bills of exchange, or exchequer bills indorsed in blank, should not have the same capability: for in all those cases the property passes to the donee by delivery.^(a)

"So, where the testator, in his last illness, expressed a wish to give a check for £1,000 to his wife, lest she might be in want of money before his executors could wind up his affairs, and a check for that amount was accordingly drawn and signed by the testator payable to his wife or bearer, and the testator handed the check to his wife, saying, "I give you this for your sole use." And she afterwards, by the desire of the testator, exchanged this check for the check, for the same amount, of another person, who actually drew the money on the testator's check in the testator's lifetime; but the wife did not receive the money on the check taken in exchange until after the testator's death. It was held, that the gift to the wife was complete, and that the £1,000 did not form a part of the testator's estate.^(b)

"It has been a matter of considerable discussion, whether a mortgage can be the subject of a *donatio mortis causa* by delivery of the mortgage deeds: but the question may now be regarded as settled in the affirmative.^(c)

"But where no property is transferred to the donee by delivery of the subject, there can be no valid *donatio mortis causa*. Thus, in *Ward v. Turner*,^(d) Lord Hardwicke held that the delivery of receipts for South Sea annuities, was not such a delivery of annuities themselves as to support the gift of them as a *donatio mortis causa*: but he intimated that an actual transfer of the stock would have been sufficient to effectuate the intended donation. On the same ground, bills of exchange and promissory notes, *not payable to the bearer*, are incapable of being the subjects of a *donatio mortis causa*. A promissory note made by a man in his last illness, cannot operate as a *donatio mortis causa* to the payee: for it has not that reference to the death of the donor, which is essential to such a gift. The same has been decided as to a check on a banker; which is an order for the payment of money, that may take effect immediately, and in the lifetime of the donor; so that it is altogether inconsistent with the nature of a donation *mortis causa*."

(z) Wms. 655.

(a) Ib. 655-6. See *Coutant v. Schuyler*, 1 Paige, 316.

(b) *Brets v. Ellis*, 22 Law J. Rep. (N. S.) Chan. 716; 17 Jur. 405, 587; 21 Eng. L. & Eq. Rep. 337.

(c) Wms. 656.

(d) 2 Ves. sen. 431.

But in respect to a promissory note, the Supreme Court of this State held, in *Wright v. Wright*,^(e) that a promissory note, executed by a testator in his last sickness, and delivered to the payee, without consideration, but in expectation of dissolution, and intended as a gift, is valid as a *donatio causa mortis*; and that an action would lie thereon, at the suit of the payee, against the executors of the maker.

This case has since, however, been expressly overruled; and it is now the law of this state, that the executory promise of the donor, whether his promissory note or his own draft upon a third party, not accepted in favor of the donee, intended as a *donatio mortis causa*, is not valid, and the donor cannot maintain an action upon it against the donor's representatives. And it seems to be further settled, that, although any instrument, executed by the donor to the donee, operating as an assignment or transfer of the donor's funds, or of a special fund of the donor in the hands of a third person, constitutes a sufficient delivery to uphold a gift *mortis causa*; yet, a draft of the donor, not accepted, for a specific sum, upon a third party, who has in his possession funds of the donor generally, does not operate as an assignment or appropriation to the donee of the sum mentioned in the draft, and therefore is not valid as a gift *mortis causa*.^(ee)

Claims founded upon gifts *mortis causa* are, however, to be admitted with great caution; and where some doubt was thrown upon a transaction of this description, in a case in Chancery, a feigned issue was awarded.^(g) The policy of the law is against the encouragement of gifts of this nature. "They are," says Mr. Justice Ruggles, in *Harris v. Clark*,^(h) "essentially testamentary; they are to take effect only in case of the testator's death, and they are revocable in his life. The same considerations of prudence and caution which induced the legislature to require wills of personal estate to be executed, published and attested with great formality, would seem to forbid these informal dispositions of property in expectation of death. The temptation to fraud and imposition, in regard to these gifts, is as powerful and as dangerous as in the case of wills, and yet has been left unchecked and unregulated by statute. And they ought not to be tolerated by the courts, unless they are attended by all the requisites which the common law prescribes, to give them validity."⁽ⁱ⁾

A *donatio mortis causa* differs from a legacy in these respects:—1. It need not be proved in the Surrogate's Court; for such a gift takes effect from delivery. So the donee claims the subject of it as a gift from the donor in his lifetime, and not under a testamentary act. 2. For the reason just given, no assent, or other act on the part of the executor or administrator, is necessary to perfect the title of the donee.⁽ⁱⁱ⁾

"A *donatio mortis causa* differs from a gift, *inter vivos*, in these re-

(e) 1 Cowen, 598.

(ee) *Harris v. Clark*, 3 Comstock, 93. See, also, *Harris v. Clark*, 2 Barb. Sup. Ct. Rep. 94; *Craig v. Craig*, 3 Barb. Ch. Rep. 106; *Wilson v. Baptist Education Society*, 10 Barb. Sup. Ct. Rep. 315, per Brown, J.; *Huntington v. Gilmore*, 16 Barb. S. C. R. 243.

(g) *Coulant v. Schuyler*, 1 Paige, 316.

(h) 3 Comstock, 121.

(i) See, also, *Kenney v. The Public Administrator*, 2 Bradf. Surr. Rep. 319.

(ii) See Wms. on Exrs. 659.

spects, in which it resembles a legacy:—1. It is ambulatory, incomplete, and revocable during the testator's life. The revocation may either be effected by the recovery of the donor from his disorder, or by resumption of the possession of the subject. But he cannot revoke the donation by a subsequent will; for, on the death of the donor, the title of the donee becomes, by relation, complete and absolute from the time of delivery. It may, however, be satisfied by a legacy given to the donee. 2. It may be made to the wife of the donor. 3. It is liable to the debts of the testator upon deficiency of assets.(k)

"Before leaving this subject, it may be proper to observe, that, since it is a rule that no one can give evidence for himself, in general a gift *mortis causa*, must be established, in equity as well as at law, by other evidence than that of the donee.(l) But where the donee is also executor or administrator, it is in some sort an exception; for, as a person in the character of an executor or administrator is examined upon oath to charge himself with receipt of assets, he may so frame his examination as to make it operate in his discharge, which necessarily enables him to prove the manner of his becoming possessed of the property delivered to him as a *donatio mortis causa*.(m)

CHAPTER VII.

OF THE DUTIES OF THE EXECUTOR OR ADMINISTRATOR IN RESPECT TO THE INVENTORY, AND OF ENFORCING THE RETURN OF INVENTORIES, AND OF THE ASSETS WHICH GO TO THE EXECUTOR OR ADMINISTRATOR.

THE proving of wills and the appointment of executors, administrators and special administrators, the control over the estate before the grant of probate or administration, and the interest of the executor or administrator in the goods, &c., of the deceased having been treated of, the law prescribing the duties and powers, and regulating the conduct of executors, administrators and collectors, in the discharge of their trusts, comes now to be considered:

The first duty of an executor, administrator or special administrator,(a) after receiving his letters, is to make and file an inventory of

(k) Wms. on Exrs. 659, and cases cited. See, also, *Bloomer v. Bloomer*, 2 Brad. Surr. Rep. 340; *Merchant v. Merchant*, Ib. 432; *Huntington v. Gilmore*, 16 Barb. Sup. Ct. Rep. 243. In the last named case a doubt is intimated, whether a subsequent bequest of the same property to a third person does not revoke the gift *mortis causa*. But the true doctrine probably is as laid down in the text, and by Mr. Surrogate, in *Merchant v. Merchant*, who declares in that case that a will does not revoke a gift *causa mortis*; because the will does not speak till the testator's death—the moment the donation, by its terms, has become absolute.

(l) See *Thorp v. Amos*, 1 Sandf. Ch. Rep. 26.

(m) Wms. 661.

(a) The special administrator or collector is expressly required to give surety, that he will make and return an inventory to the surrogate within three months. See 2 R. S. 77; 4th ed. 262, sec. 43; *Ans.*, p. 231.

the personal property of the deceased. The ancient ecclesiastical law was very strict with respect to the making of inventories, and the consequences of neglecting to make one, seems to have been to prevent the executor from relying on want of assets. Even the temporal courts formerly considered the neglect of this duty in a light unfavorable to the party, especially where there was a deficiency of assets; and although not conclusive on him, yet exposing him to imputation.(b)

If the executor or administrator neglect this duty, he will render himself liable, personally, for all costs and expenses of compelling its performance. It is, besides, the part of a prudent person who sustains such an office, in every case to see that the effects are carefully appraised, and reduced into an inventory, not only because he may be summoned to produce it, but also because a distinct and accurate knowledge of the fund is necessary, as will appear from the sequel, to direct him in the safe execution of the trust.(c)

The law requires that the inventory shall be made by the executor or administrator, with the aid of appraisers duly appointed for that purpose by the surrogate.

Of the Appointment of Appraisers.

The article of the Revised Statutes, relating to the duties of executors and administrators, in taking and returning inventories, provides as follows :

Sec. 1. Upon the application of any executor or administrator, the surrogate who granted letters testamentary or of administration, shall, by writing, appoint two disinterested appraisers, as often as occasion may require, to estimate and appraise the property of a deceased person; and such appraisers shall be entitled to receive a reasonable compensation for their services, to be allowed by the surrogate.(d)

A verbal application for the appointment of appraisers is sufficient; it need not be in writing. They are appointed by the surrogate, and an order for their appointment is made and entered in his minutes. (For form of the order, see Appendix, No. 41.) The surrogate has the selection of the appraisers, and the reason of the statute would seem to require that he should designate these officers, in order to insure as well competency as impartiality in the discharge of their duties. The practice has been, for the surrogate to appoint such competent persons as the executor or administrator might nominate.(e)

Of the Notice of the Appraisement, and the Qualification of the Appraisers.

The statute directs as follows :

Sec. 2. The executors or administrators of any testator or intestate, within a reasonable time after qualifying, and after giving the notice in the next section required, with the aid of appraisers so appointed

(b) Wms. on Exrs. 835, and note.

(c) Toller on Exrs. 250.

(d) 2 R. S. 82; 4th ed. 268.

(e) In the court of the surrogate of the county of New York, the surrogate, in most cases, names one of the appraisers, and the executor or administrator the other.

by the surrogate, shall make a true and perfect inventory of all the goods, chattels and credits of such testator or intestate, and where the same shall be in different and distant places, two or more such inventories as may be necessary.

Sec. 3. A notice of such appraisement shall be served five days previous thereto, on the legatees and next of kin, residing in the county where such property shall be; and it shall also be posted in three of the most public places of the town. In every such notice the time and place at which such appraisement will be made shall be specified.

Sec. 4. Before proceeding to the execution of their duty, the appraisers shall take and subscribe an oath, to be inserted in the inventory made by them, before any officer authorized to administer oaths, that they will truly, honestly and impartially appraise the personal property which shall be exhibited to them, according to the best of their knowledge and ability.^(ee)

It will be observed, that the statute requires executors and administrators to exhibit inventories, as part of their duty, without any proceeding to call upon them to do so. The above second section provides that the executor or administrator shall make the inventory within a reasonable time after qualifying; and the statute afterwards, as will presently appear, requires that the inventory shall be returned by the executor or administrator to the surrogate within three months from the date of his letters.

(For form of the notice under the above section, numbered 3, see Appendix, No. 42.)

Whether the service of this notice on the legatees and next of kin must be personal, or how otherwise, is not stated. Probably such service as is required of a citation on proving a will, is sufficient. The effect of an omission to serve or post a notice at all is not declared; and there is nothing directing the surrogate to exact any observance of this section.

(For form of the appraiser's oaths, according to the above section, numbered 4, see Appendix, No. 43.)

Of the Manner of taking the Inventory, and of the Property to be included therein, and to be deemed Assets, and of the Property exempt from Appraisalment, and to remain in the possession of the Widow.

The statutes provide as follows:

Sec. 5. The appraisers shall, in the presence of such of the next of kin, legatees or creditors of the testator or intestate as shall attend, proceed to estimate and appraise the property which shall be exhibited to them; and shall set down each article separately, with the value thereof in dollars and cents distinctly, in figures, opposite to the articles respectively.

Sec. 6. The following property shall be deemed assets, and shall go to the executors or administrators, to be applied and distributed as part of the personal estate of their testator or intestate, and shall be included in the inventory thereof.

^(ee) 2 R. S. 82; 4th ed. 268; S. L. 1837, 534, sec. 59; 2 R. S. (4th ed.) 271, sec. 18; S. L. 1849, 235; 2 R. S. (4th ed.) 700; S. L. 1850, ch. 201.

1. Leases for years ; lands held by the deceased from year to year ; and estates held by him for the life of another person.

2. The interest which may remain in the deceased at the time of his death, in a term for years, after the expiration of any estate for years therein, granted by him or any other person.

3. The interest in lands devised to an executor for a term of years, for the payment of debts.

4. Things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support.

5. The crops growing on the land of the deceased at the time of his death.

6. Every kind of produce raised annually by labor and cultivation, excepting grass growing and fruit not gathered.

7. Rent reserved to the deceased, which had accrued at the time of his death.

8. Debts secured by mortgages, bonds, notes or bills ; accounts, money and bank bills, or other circulating medium, things in action, and stock in any company, whether incorporated or not.

9. Goods, wares, merchandize, utensils, furniture, cattle, provisions, and every other species of personal property and effects, not hereinafter excepted.

Sec. 7. Things annexed to the freehold or to any building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of the last section.(g)

Sec. 8. The right of an heir to any property not enumerated in the preceding sixth section, which, by the common law, would descend to him, shall not be impaired by the general terms of that section.

Sec. 9. Where a man having a family shall die, leaving a widow, or a minor child or children, the following articles shall not be deemed assets, but shall be included and stated in the inventory of the estate, without being appraised.

1. All spinning wheels, weaving looms, and stoves put up or kept for use by his family.

2. The family Bible, family pictures and school books used by or in the family of such deceased person ; and books, not exceeding in value fifty dollars, which were kept and used as part of the family library, before the decease of such person.

3. All sheep, to the number of ten, with their fleeces, and the yarn and cloth manufactured from the same ; one cow, two swine, and the pork of such swine.

4. All necessary wearing apparel, beds, bedsteads and bedding ; necessary cooking utensils ; the clothing of the family ; the clothes of a widow and her ornaments proper for her station ; one table, six chairs, six knives and forks, six plates, six tea cups and saucers, one sugar dish, one milk pot, one tea pot, and six spoons.(h)

Sec. 10. The said articles shall remain in the possession of the widow, if there be one, during the time she shall live with, and pro-

(g) 2 R. S. 83 ; 4th ed. 269.

(h) *Ib.*

vide for, such minor child or children. When she shall cease so to do, she shall be allowed to retain as her own, her wearing apparel, her ornaments and one bed, bedstead and the bedding for the same; and the other articles so exempted, shall then belong to such minor child or children. If there be a widow, and no such minor child, then the said articles shall belong to such widow.

Sec. 2. When a man having a family shall die, leaving a widow or minor child or children, there shall be inventoried by the appraisers, and set apart for the use of such widow, or for the use of such widow and child or children, or for the use of such child or children, in the manner now prescribed by the ninth section of title third, chapter six, of part second, of the Revised Statutes, necessary household furniture, provisions or other personal property in the discretion of said appraisers, to the value of not exceeding one hundred and fifty dollars, in addition to the articles of personal property now exempt from appraisal by said section.⁽ⁱ⁾

Sec. 12. [Sec. 11.] The inventory shall contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money belonging to the deceased, which are known to such executor or administrator, specifying the name of the debtor in each security; the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, may be collectable on each security.⁽ⁱⁱ⁾

Sec. 13. [Sec. 12.] The inventory shall also contain an account of all moneys, whether in specie or bank bills, or other circulating medium belonging to the deceased, which shall have come to the hands of the executor or administrator; and, if none shall have come to his hands, the fact shall be so stated in such inventory.

Sec. 14. [Sec. 13.] The naming of any person executor in a will, shall not operate as a discharge or bequest, of any just claim which the testator had against such executor; but such claim shall be included among the credits and effects of the deceased, in the inventory, and such executor shall be liable for the same, as for so much money in his hands, at the time such debt or demand becomes due; and he shall apply and distribute the same in the payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased.

Sec. 15. [Sec. 14.] The discharge or bequest in a will, of any debt or demand of the testator, against any executor named in his will, or against any other person, shall not be valid as against the creditors of the deceased; but shall be construed only as a specific bequest of such debt or demand; and the amount thereof shall be included in the inventory of the credits and effects of the deceased, and shall, if necessary, be applied in the payment of his debts; and, if not necessary for that purpose, shall be paid in the same manner and proportion as other specific legacies.^(k)

The appraisers having been sworn, the executor or administrator, with their aid, on the day and at the place specified in the notice, in

(i) S. L. 1842, 194; 2 R. S. (4th ed.) 270, sec. 11.

(ii) 2 R. S. 84; 4th ed. 270.

(k) *Ib.*

the presence of such of the parties as choose to attend, proceeds to make out the inventory of the property, according to the appraiser's estimate and appraisement.

The inventory exhibited by an executor or administrator, ought to contain a full, true and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir, the widow, and the donee *mortis causa* of the testator or intestate. It must also distinguish such debts as are separate from those which are doubtful or desperate; (l) and by the above section, numbered 11, the inventory must state the sum which, in the judgment of the appraisers, may be collectable on each security.

The above section, numbered 6, specifies with great particularity the property which is to be deemed assets, and go to the executor or administrator, and be included in the inventory. The meaning and objects of this section are thus explained by the revisers, in a note to their original report to the legislature. They say:—

"It seemed important to give information to executors, administrators and appraisers, of the description of property which was committed to their charge. The decisions of the courts have fluctuated in respect to some of the articles enumerated, and it is desirable that the law relating to them should be made as permanent as it can be by legislative authority.

"It has been supposed that the same legal character should be given to an article, without reference to the parties in controversy, and that, therefore, certain fixtures which are deemed chattels as between landlord and tenant, should be considered in the same light as between executor and heir. A reference to Toller's Treatise, at p. 199, and to 6 Cowen's Rep. 655, will exhibit the uncertainty of the law on this point. It ought, at all events, to be definitively settled.

"For these reasons, this section has been drawn with great care, so as to enumerate those articles which are likely to occasion doubt, to settle some disputed cases, and yet to include everything which ought to be included by the use of general terms, and, at the same time, to protect the heir." (m)

The fourth subdivision of the sixth section specifies the things which are to be considered personal property, as distinguished from fixtures.

Taken literally, this provision would strip the heir of the wheels, gearing, and all the other machinery fixed in the ordinary way to a mill or manufactory inherited by him. It is certainly contrary to the ancient common law, (n) and seems to derive very questionable countenance from more modern authority. (o)

A pump and pipe, balances and scales, and a beer pump, are *prima facie* personal property, and can only descend to the heir, in conse-

(l) Wms. on Exrs. 841.

(m) 3 R. and or. S. (2d ed.) App. 639.

(n) "See 11 Vin 167; Executor, (z) pl. 6; Amos & Fer. on Fixt. 133, and cases there cited, on to p. 138."

(o) *Walker v. Sherman*, 20 Wend. 636; *Squier v. Mayer*, a short note of which is given in 2 Freem. 246, goes the farthest towards this statute rule; but how very doubtful this and some other modern cases of the like tendency are, may be seen by Amos & Fer. on Fixt. ch. 4, sec. 2, p. 151, and cases there cited. See, also, Gibbons on Fixt. 11, 12." 20 Wend. 654.

quence of being annexed to the freehold in such a manner, and under such circumstances, as to come within the above seventh section of the statute.(p)

With respect to the above section, numbered 8, the revisers, in their note, say that it was inserted from abundant caution.(q)

In stating in the inventory the articles exempt from appraisement by the above 9th section, care should be taken so to describe them that they may be easily identified and separated from the other personal property. The articles set apart, pursuant to the second section of the Law of 1842, above quoted, ought to be distinguished from the other reserved articles, and stated to be set apart by the appraisers, in the exercise of their discretion, pursuant to that statute. The terms of this second section do not give the appraisers a discretion in the cases mentioned, as to whether they will or will not set apart the articles, or the amount in value of such articles, but merely as to the particular articles which they will set apart.(r) As they may set apart any per-

(p) *Hovey v. Smith*, 1 Barb. Sup. Ct. Rep. 372.

(q) 3 R. S. (2d ed.) App. 639.

(r) In *Bliss v. Sheldon*, 7 Barb. Sup. Ct. Rep. 150, in the judgment of the court, delivered by Mr. Justice Gridley, a reference is made to the construction of this statute, given in the first edition of this work; but an opinion is not expressed as to its correctness. No examination is made of the other provisions of the act of 1842.

In a work, entitled "WRIGHT'S EXECUTOR'S GUIDE," by David Wright, counsellor-at-law, a construction is placed upon this statute directly contrary to that given in the text. As a curious specimen of legal erudition, and as exhibiting a novel, but, probably, convenient mode of legal research, it is deemed proper to insert this writer's position and argument, upon that question, in full:—

"The legislature have left it entirely to the discretion of the appraisers, whether they will allow the widow and children any part of the amount specified in this section; or, if any part, how much. From their decision there seems to be no appeal.

"Finding, upon the publication of the first edition of this work, that there were some who differed with me in regard to the construction of this statute, I sent a copy of the second edition to Chancellor Walworth, and in the letter accompanying the same, called his attention particularly to my construction of this statute. In answer, he says:—'I see no grounds for questioning your construction of the act of 1842, relative to the \$150.' The legislature appear to have intended to make the appraisers the judges, whether any household furniture, provisions, or other personal property, was necessary for the family, and if so, how much and what articles, not exceeding the amount prescribed, &c. I also, about the same time, sent a copy of the book to Hon. Lewis H. Sandford, then Vice-Chancellor of the first Circuit, now one of the justices of the Superior Court of New York, and called his attention to the same part of the work, and received from him a letter of the same purport as the above. I am not aware of any reported case upon the subject. If the legislature has made the appraisers the judges in the matter, and submitted the matter to their discretion, I can't see what court or officer can assume to control them in their judgment, or compel them to exercise their discretion otherwise than as to them may seem discreet."

It is quite apparent, that the reason Chancellor Walworth saw "no grounds for questioning," &c., was because he did not look. He was presented with the second section of the Act of 1842, alone by itself; and this writer's printed construction of it, in the second edition of "his work;" and asked for his opinion—and he politely says, "he sees no grounds," &c. A moment's reference to the provisions of the first section of the act, it is believed, would have shown him, at any rate, some grounds for questioning this writer's construction of the provision in question. Whether the statement, in the next sentence, of what the legislature appear to have intended, was a part of Chancellor Walworth's letter, or flowed spontaneously from the wisdom of the counsellor—and whether Vice-Chancellor Sandford concurred in this sentiment or not, are, perhaps, left in little doubt and obscurity; but one thing is certain, that it speaks no compliment, of either the good sense or the consistency of the legislature, to suppose that, in this statute, the objects of the two sections of which are identical, to put a certain portion of the property of a debtor or deceased person out of the reach of his creditors, they should have made the exemption absolute in the case of the living debtor, but left the family of the deceased person at the mercy of the discretion, ignorance or caprice

sonal property, they may in their discretion set apart the whole in money, or a portion in furniture or other articles and a portion in money.

The act of 1842, is entitled "An act to extend the exemption of household furniture and working tools from distress for rent, and sale under execution." (s) And the first section provides that, in addition to the articles now exempt by law from distress for rent, or levy and sale under execution, there shall be exempted from such distress, and levy and sale, necessary household furniture and working tools, and team owned by any person being a householder, or having a family for which he provides, *to the value of not exceeding one hundred and fifty dollars*. The right of the debtor, under this provision, to the exemption, to the full amount of one hundred and fifty dollars, is perfectly clear. The second section then provides for a case in which property might be taken from the family of a deceased person, under circumstances of the same hardship as those for which a remedy is afforded by the first section; and property, in the discretion of the appraisers, is exempted to the value of not exceeding one hundred and fifty dollars. The same reason for the exemption, to the full amount of one hundred and fifty dollars, exists in both cases; and the grammatical construction and punctuation of the section confirm this view of its

of the appraisers—a discretion, in this writer's opinion, beyond control—and appraisers, of whom he has, in his own fine way, stated, he "can't see what court or officer can assume to control them in their judgment, or compel them to exercise this discretion, otherwise than as to them may seem *discreet*." There is not any reported case, expressly deciding this particular question; but it is believed that no one, having practical occasion to examine the subject, will be found to agree in opinion with the counsellor. *Bliss v. Sheldon* certainly does not favor the doctrine, that it lies in the breast of the appraisers utterly to deprive the widow and minor children of the amount of the exemption. The surrogate of the county of New York clearly considers it the duty of the appraisers to set apart property as exempt. In *Ap-plegate v. Cameron*, 2 Bradf. Surr. Rep. 121, where the appraisers had set apart more than the amount limited by the statute, he says:—"The discretion given to the appraisers relates to the particular property set apart; that is, they may appropriate household furniture, provisions, or other personal property, in their discretion." And again:—"If the appraisers should neglect to set apart any property for the widow or minor children, or if, in discharging their duty, they commit error, the surrogate has such a supervision of their proceedings that he may correct any irregularity, mistake or improper valuation." And it is known that the surrogate of the county of Kings concurs in the same view of the statute.

It remains only to add, that this error, of this writer's, is liable to prove peculiarly unfortunate and mischievous, from the name and ostensible character of the book in which it occurs, and the kind of persons among whom the book is calculated to circulate. The book is styled "Wright's Executor's Guide," is sold at a low price, and mostly finds its way into the hands of executors or administrators of small estates and contracted ideas, who purchase it as a substitute for the advice of a lawyer, or to save themselves the trouble of going to the surrogate's office, where they are in doubt as to their powers or duty. It is with reference to such estates and in such cases, that the amount set apart for the widow and minor children, by the statute, is most likely to become a matter, both of importance and of dispute. The estate being small and the debts large, and the executor, perhaps, unfriendly to the widow, the appraisers, at his instance, in order that the fund for the payment of the debts may be as large as possible, and on the strength of that opinion of the counsellor-at-law, refuse to set apart any property for the widow and family. The result of which would be, unless the widow bowed to the same authority, to involve the executor in trouble, expense and a law suit. And other cases might be given of evils flowing from this deliberate and maturely considered blunder.

It is a blunder, however, which a writer like the author of this Guide, apparently entirely unacquainted with the examination of legal subjects, would very naturally fall into. Whether that is its sufficient excuse, is another question.

(s) S. L. 1842, ch. 157, p. 193.

meaning. There could not be any reason for vesting in the appraisers a discretion as to the amount to which the exemption should be extended. Even supposing that the exemption applies only as against creditors, the appraisers, at such an early stage of the administration, could not have the means of judging whether it ought to be allowed or not. To prevent disputes between the widow or minor children, and the executor or administrator, as to what particular articles or property should be reserved, and to protect the widow and children from imposition or fraud, the appraisers are very properly given a discretion to make the selection. Another purpose of their discretion, it may be presumed, was intended to be, that in setting apart the exempt articles or property, no single article should be reserved, which, being taken away, would render an entire lot or set, or combination, of greatly and more than proportionably, diminished value; as, for instance, if the widow or children should be allowed to take one of a span of horses, or a yoke of oxen, or a single volume of a number constituting an entire work, or a fragment of a piece of furniture or machinery. But to give them a discretion to what amount, not exceeding one hundred and fifty dollars, the exemption should extend, and consequently, whether the widow and children should be allowed anything whatever, it is submitted, most clearly, was not the intention of the legislature in enacting this provision.

The 10th section provides for the disposition of the exempt articles.

The articles so exempted by these sections of the statute, in favor of the family of a man who dies leaving a widow and minor children, are to remain in the widow's possession so long as she is able and willing to keep up the family circle, and provide suitably for the minor children. If the children leave the widow during their minority, contrary to her wishes, and without any fault or omission on her part, she is still entitled to the possession of the property until they arrive at full age, though they are provided for by another. It is otherwise, if it appear that they left in consequence of improper treatment or misconduct on the part of the widow. It is not enough for her to say to the children: "Here is a shelter, and there is bread;" if, at the same time, she makes them wretched by her misconduct. That is not *providing* for the children within the meaning of the statute, and they may well go out from her, and demand their portion of the property. The rule on this subject is the same, whether the widow be the mother or step-mother of the children.^(t)

Under the above ninth section of the Revised Statutes, and under the second section of the act of 1842, the executor or administrator is entitled to take the articles designated as exempt into his possession or custody on the death of the owner, in order that he may inventory them as directed by the statute; and the widow cannot maintain trespass against the executor for so taking such articles into his possession. And, in respect to the property given to the widow by the act of 1842, she has no right to any specific chattel under that act, until it has been inventoried and set apart for her by the appraisers. But if the execu-

(t) *Scofield v. Scofield*, 6 Hill, 642.

tor should keep the articles from the widow for an undue time, or otherwise abuse his right, he would become a trespasser *ab initio*.^(u)

If the executor or administrator file an inventory of the personal estate of the decedent, without setting off any part of the property to the widow, as exempt articles under the provisions of the Revised Statutes, or of the act of 1842, and convert into money all the articles contained in the inventory, the surrogate has the power to order them to pay to the widow a sum of money, in lieu of what she was entitled to receive under the exemption laws.^(v)

And where^(w) there was an ante-nuptial agreement, by which the proposed husband covenanted and agreed to, and with, his intended wife, that if the marriage should take effect, in the event of his death before hers, he would, by his last will and testament, in writing or otherwise, give and assure unto her a certain sum yearly during her life, and also the use and occupation of certain property; and the wife agreed that such grant was to be received in lieu of dower, or any other portion of the husband's property after his decease, but he died without making such settlement or provision—it was held, that the widow was not barred of any rights which she might have asserted if no such agreement had been executed, and that she might therefore claim the exempt articles of personal property given to a widow by the statute.

The duty assigned by the statute to the appraisers is not vested in them absolutely. The discretion given to the appraisers relates to the particular property set apart—that is, they may appropriate household furniture, provisions, or other personal property, in their discretion; but so far from having any power beyond this, they are expressly restrained by the limitation that the property so assigned shall not exceed one hundred and fifty dollars in value. They are to estimate the value; but their action is not judicial. They are officers appointed by the surrogate to estimate and appraise the property; but the estimate and appraisement, when made, are not conclusive. By the first section, above quoted from the Revised Statutes, if the appraiser should neglect to set apart any property for the widow or minor children, or if, in discharging their duty, they commit error, the surrogate has such a supervision of their proceedings, that he may correct any irregularity, mistake or improper valuation. Otherwise there would be no remedy; and if appraisers should be allowed to set apart property of any value, without their valuation being subject to review, it would open a wide door for fraud. Accordingly, where articles were set apart by the appraisers, valued at a sum exceeding one hundred and fifty dollars, it was held that the act was, on its face, a violation of the statute, and invalid.^(x)

The above section, numbered 11, specifies certain particulars of the securities belonging to the decedent, which must be stated in the inventory. The revisers, in their note to this section, say, that it was inserted as well to insure a faithful inventory, as to protect executors,

(u) *Voelckner v. Hudson*, 1 Sandf. Superior Ct. Rep. 215.

(v) *Bliss v. Sheldon*, 7 Barb. Sup. Ct. Rep. 152.

(w) 7 Barb. Sup. Ct. Rep. 152.

(x) *Applegate v. Cameron*, 2 Bradf. Surr. Rep. 119.

who are not generally aware that they are responsible for debts, unless returned desperate, or proved by them to be so. It will also, they add, preserve evidence of the contents of the papers, in case of their loss.^(y)

Stocks, bonds, mortgages, notes and other securities, should be so described, as that the appraisement shall show on its face that they are correctly valued, or that any discrepancy or error in the valuation may easily be perceived, and afford no ground for an imputation of anything improper or dishonest.

The interest of the deceased in the stock in trade, effects and credits of a firm in which he was a partner, must be included. It may be given as one item; and should be stated with all practicable accuracy. Its value may be ascertained from the books and accounts of the partnership; and the executor or administrator is entitled to all necessary information in respect to such interest, from the surviving partner, and from all other sources.

It is only the interest of the deceased partner, in the surplus, after the payment of the partnership debts, which is assets in the hands of his executor or administrator. It is not usual, therefore, to make a specific inventory of co-partnership assets, but it is deemed sufficient to note generally the co-partnership interest, as an interest in an unascertained balance—the balance, when found, being the only thing in which the administrator has any individual right of property, for the exclusive benefit of the estate of his intestate.^(z) A qualified statement in the inventory, as to a partnership interest, is proper, and is generally the only one which can be made with due prudence.

All the personal property of the decedent should be stated in the inventory, without reference to the situation or the future destination of any of the same, or to any directions in regard thereto, made by the testator. In a case where a testatrix directed her executors to deliver certain parcels sealed up and directed to certain persons, which were in a small iron chest, to the persons to whom they were directed, unopened, and desired those persons would not tell one another what was contained in their respective papers; the court was of opinion, that if the executors should be called to an inventory, they could not give one on oath, without knowing what was contained in those parcels, and that they could not safely deliver them unopened.^(a)

The court can only require that all the deceased died possessed of should be included in the inventory; it cannot call for an account of the subsequent profits in his business. Again, it is not competent for the court to require an inventory of personal estate situate in another state or in a foreign country; for foreign estates are out of the jurisdiction and cognizance of the surrogate.^(b) But if personal property belonging to the estate situate abroad, or the avails thereof, afterwards come into this state, the executor or administrator should then file a further inventory or account for the same.

(y) 3 R. and or. S. (2d ed.) App. 640.

(z) *Thomson v. Thomson*, 1 Bradf. Surr. Rep. 24, 35.

(a) "*Pelham v. Newton*, 2 Cas. Temp. Lee, 46;" Wms. 323, 1235.

(b) See Wms. 842.

The above 12th section requires a particular statement as to moneys left by the deceased, and the 13th and 14th sections, in this connection, relate to the insertion in the inventory of debts due to the testator by the executor, and of debts discharged by the will.

(For a form of an inventory complete, see Appendix, No. 43.)

Of returning the Inventory, and of the Executor's or Administrator's Oath to the same.

The statutory provisions are as follows :

Sec. 16. [Sec. 15.] Upon the completion of the inventory, duplicates thereof shall be made and signed by the appraisers ; one of which shall be retained by the executor or administrator, and the other shall be returned to the surrogate within three months from the date of such letters.

Sec. 17. [Sec. 16.] Upon returning such inventory, the executor or administrator shall take and subscribe an oath, before the surrogate ; or if such surrogate be absent from the county, or incapable, from sickness or otherwise, of transacting business, or his office be vacant, then before a judge of county courts of such county ; stating that such inventory is, in all respects, just and true—that it contains a true statement of all the personal property of the deceased which has come to the knowledge of such executor or administrator, and particularly of all money, bank bills, and other circulating medium belonging to the deceased, and of all just claims of the deceased against such executor or administrator, according to the best of his knowledge. Such oath shall be indorsed upon, or annexed to the inventory.(c)

By the 59th section of the act of 1837, this oath may be administered by the surrogate, or by any commissioner of deeds, or judge of county courts.(d) And the clerk or clerks of the surrogate of the county of Kings,(e) and the assistants appointed by the surrogate of the county of New York,(ee) also have authority to administer this oath.

The duplicate inventory is for the convenience of the executor or administrator. It provides him with an authentic statement of all the property which has come into his hands, and is a reliable foundation for his future proceedings in the administration. The time within which the inventory must be returned, is expressly limited by the above 15th section to three months from the date of the letters. This period, as will presently appear, may, however, for good cause, be extended by the surrogate.

The inventory must be returned under oath.

(For form of the affidavit, to be indorsed upon or annexed to the papers, pursuant to the above section, numbered 16, see Appendix, No. 44.)

The appraisers sometimes annex to the inventory and duplicate a certificate, setting forth that they have duly appraised the personal estate, which they subscribe, but that is unnecessary ; all that is re-

(c) 2 R. S. 85 ; 4th ed. 270.

(d) S. L. 1837, 534 : 2 R. S. (4th ed.) 271. In Suffolk county, the oath may be taken before any officer authorized to administer oaths. S. L. 1833, ch. 233, p. 306.

(e) S. L. 1849, 235 ; 2 R. S. (4th ed.) 700.

(ee) S. L. 1850, ch. 201. See *ante*, p. 227.

quired, and strictly all that is proper, is, that they should sign the papers.

By the above section, numbered 1, heretofore considered, (g) the appraisers are entitled to a reasonable compensation for their services, to be allowed by the surrogate. The executor or administrator usually pays them without obtaining the approval of the surrogate, and has the bill allowed on the settlement of the estate; but he may ask the surrogate's sanction before making the payment, and this is undoubtedly the more prudent course.

Of the Proceedings to compel an Executor or Administrator to return an Inventory.

The following sections of the statute provide for the case of an executor or administrator neglecting or refusing to return an inventory within the three months above limited, and prescribe the measures to be taken for compelling him to return the same, and the remedy for his non-performance of this duty.

Sec. 17. If any executor or administrator shall neglect or refuse to return such inventory, within the time aforesaid, or within such further time, not exceeding four months, as the surrogate shall for reasonable cause allow; the surrogate shall issue a summons, requiring such executor or administrator, at a short day therein to be appointed, to appear before him, and return an inventory according to law, or show cause why an attachment should not be issued against him. (h)

Sec. 18. If, after personal service of such summons, such executor or administrator shall not, by the day appointed, return such inventory on oath, or obtain further time to return the same, the surrogate shall issue an attachment against him, and commit him to the common jail of the county, there to remain until he shall return such inventory.

Sec. 19. If such summons cannot be served personally, by reason of such executor or administrator absconding or concealing himself, or if, after being committed to prison, such executor or administrator shall neglect for thirty days to make and return such inventory, the surrogate may thereupon issue, under his seal of office, a revocation of the letters testamentary, or letters of administration before granted to such executor or administrator, reciting therein the cause of such revocation; and shall grant letters of administration of the goods, chattels and effects of the deceased unadministered, to the person entitled thereto, (other than such executor or administrator,) in the same manner as original letters of administration or letters testamentary.

Sec. 20. Such letters of administration or letters testamentary shall supersede all former letters, and shall deprive the former executor or administrator of all power, authority and control over the personal estate of the deceased; and shall entitle the person appointed by such letters, to take, demand and receive the goods and effects of the deceased, wherever the same may be found. (i)

Sec. 21. In every such case of revocation, and whenever directed by

(g) See *ante*, p. 244.

(h) 2 R. S. 85; 4th ed. 271.

(i) 2 R. S. 85; 4th ed. 271.

the surrogate, the bond given by such former executor or administrator shall be prosecuted, and a recovery shall be had thereon to the full extent of any injury sustained by the estate of the deceased, by the acts or omissions of such executor or administrator, and to the full value of all the property of the deceased received, and not duly administered, by such executor or administrator; and the moneys collected thereon shall be deemed assets in the hands of the person to whom such subsequent letters shall have been issued.

Sec. 22. Every executor or administrator committed to prison as aforesaid, may be discharged by the surrogate or a justice of the Supreme Court, or a circuit judge, on his delivering, upon oath, all the property of the deceased under his control to such person as shall be authorized by the surrogate to receive the same.⁽ⁱ⁾

Under the above section, numbered 17, if the executor or administrator find it impracticable to return an inventory within three months after the date of his letters, the surrogate may allow him further time, not exceeding four months, on his showing reasonable cause therefor. The application for further time must be made before the three months have expired. It is *ex parte*, and is made on a petition under oath, or an affidavit setting forth the cause. The surrogate extends the time at his discretion within the four months; and if the time be extended, an order for that purpose should be entered. (For forms of the proceedings, see Appendix, No. 45.)

The same 17th section provides for the issuing of a summons to compel a delinquent executor or administrator to return an inventory. It gives the surrogate authority to take proceedings against him of his own motion. But the exercise of this authority, in case the executor or administrator should prove contumacious, and the proceedings should extend to a revocation of his letters, would be likely to lead to a series of difficulties in settling the administration, and might, perhaps, render the surrogate liable to trouble and responsibilities, which probably the duties of his office do not strictly call upon him to incur. The surrogate, therefore, never *ex officio* calls upon an executor or administrator for an inventory.^(k) The delinquency must be brought to the notice of the court by third persons duly interested in the estate of the decedent.

Any person having an interest in the personal property of the deceased, may compel the executor or administrator to return an inventory. The proceeding is by petition to the surrogate. Such petition should allege the interest of the party in the personal property of the testator or intestate, and should set forth the time of the granting of the letters testamentary or of administration, and the expiration of the three months, and of any extended time which may have been granted, and should pray the issuing of a summons pursuant to the above 17th section.

In the ecclesiastical courts in England, an executor or administrator is compellable to exhibit an inventory at the prayer of any person having an interest, or even the *appearance* of an interest. Thus, the

(i) Ib. 86; 4th ed. 272.

(k) See *Thomson v. Thomson*, 1 Bradf. Surr. Rep. 24.

personal representative of the residuary legatee of him who was the residuary legatee of the original testator, has sufficient interest for the purpose of calling on his personal representative to exhibit an inventory. Again, it has been laid down in a variety of cases, that a probable or contingent interest will justify a party in calling for an inventory.^(l)

Thus, if a creditor swears to certain sums due from the deceased to him, it is enough to entitle him to an inventory, though the debt be contested. So, where the assignees of a bankrupt make an affidavit of a debt due from the deceased to the bankrupt, the administrator was assigned to exhibit an inventory, notwithstanding the Statute of Limitations had run out since the administration was granted.^(m)

So, in England, the court will compel an executor to bring in an inventory, &c., at the suit of a creditor, by a bond of the testator, notwithstanding its alleged invalidity; and though a suit is actually commenced on the bond, and then depending at common law; and the court will not notice the effect of any release which a legatee may have given. Nor will a court of equity restrain the next of kin from compelling an administrator to exhibit an inventory, on the ground that he has an equitable demand against the personal estate of his intestate. Likewise, an executor, who is also residuary legatee, may call on his co-executor for an inventory; and so he may, perhaps, without any such special interest.⁽ⁿ⁾

And in the court of the surrogate of the county of New York, a mere appearance of an interest is sufficient to entitle a party to a summons for an inventory. And where the executor or administrator contests the claim of the applicant, still, if the petition be properly verified, the surrogate will require the inventory without trying the issue between the parties.^(o)

The petition should properly be under oath; and unless the party complaining swear to the truth of the allegation of interest, the surrogate will, perhaps, refuse to issue the summons; because, although it is the duty of the executor or administrator to return an inventory, yet he may be very honestly carrying on the administration without performing that duty, and the court ought not to permit him to be harassed by prosecutions undertaken by persons in no way concerned in or prejudiced by his conduct. Besides, if the petition be sworn to, the burthen of disproving it will lie on the executor or administrator, in case he dispute its allegations. (For form of the petition, see Appendix, No. 46.)

On filing the petition, a summons issues, an order for which must be duly entered. (For form of the order and summons, see Appendix, No. 47.)

Sufficient time should be allowed between the issuing and the return day of the summons, to enable the executor or administrator to have appraisers appointed, and to give the requisite notice, and make out and complete the inventory. It should be served about seven days

(l) Wms. 836, and cases cited.

(m) Wms. 837, and cases cited.

(n) lb.

(o) *Thomson v. Thomson*, 1 Bradf. Surr. Rep. 24.

before the day fixed for complying with its exigency; and if such has been the case, the surrogate will require very substantial reasons for granting any further time. And he probably will not, in any case, extend the time, without affording the petitioner an opportunity to be heard. If the executor or administrator file an inventory, the same proceedings are to be had on his part, in respect to the appointment of appraisers and the service and posting of notices, as in the case of the voluntary return of an inventory, and the inventory is to be made out in similar form.

The executor or administrator may appear, on the return day of the summons, and contest the petitioner's allegation of interest. It has been seen that, if the petitioner have an interest, or even the *appearance* of an interest, it is sufficient to sustain the petition. But if the executor or administrator totally refute the petitioner's allegation of interest, or show his demand of an inventory to be vexatious, the petition will be dismissed. As, if an administrator disprove kindred in a party claiming as next of kin, the surrogate will not decree an inventory. And in England, in *Boon's case*,^(p) where a legacy was to be paid at three several payments, and the executor having made two, and tendered the third, was cited by the legatee to bring in an inventory, it was holden by the delegates, and also on a commission of review, that there was no need of an inventory at his instance: So, in *Fleet v. Holmes*,^(q) in a suit for the recovery of a legacy, Sir G. Lee refused to decree an inventory, thinking it useless; because the executrix had, in her answers, confessed assets sufficient to cover the legacy, and the interest claimed thereon, and the costs of the suit. Again, in *Leighton v. Leighton*,^(r) where an executrix, being cited to exhibit an inventory, gave in a declaration *loco inventarii*, in which she declared that the deceased, by a bill of sale in consideration of a debt due to her, granted to her by bill of sale all the personal estate of which he should die possessed; Sir G. Lee held, that the declaration was sufficient, and refused to compel an inventory.^(s)

And although no statute, or rule of positive law, has fixed any time certain, within which an inventory or account must be sued, still reason and justice prescribe some limitation. Thus, in England, in a modern case,^(t) it was held, that the lapse of forty-five years, in conjunction with circumstances, afforded a reasonable presumption of the estate's having been fully administered; and that, therefore, the inventory and account might be dispensed with. So, where twenty-four years after the death of the intestate, eleven years after the youngest child attained twenty-one, and seven years after his insolvency, his provisional assignee sued the administratrix for an inventory and account; and it appeared, that shortly after the intestate's death, a valuation and inventory had been made, and facts were shown, from which it might be fairly presumed that the insolvent had received

(p) "Sir T. Raym. 470."

(q) "2 Cas. Temp. Lee, 101."

(r) "2 Cas. Temp. Lee, 356."

(s) Wms. 838.

(t) "*Ritchie v. Rees*, 1 Add. 144."

more than his share; the court refused the application.^(u) So, in a modern case,^(v) a party having, after the lapse of thirty-five years, called for an inventory and account of an insolvent estate, the executor, who appeared under protest, was dismissed with costs. And on another occasion,^(w) in a case of inventory and account, brought by a legatee, a declaration, (instead of an inventory,) setting forth desperate debts due to, and large debts due from the estate, but annexing no vouchers nor accounts, was held sufficient after a lapse of seventeen years: and Sir John Nicholl laid down, that in such a suit the court cannot decide whether debts alleged to be due from the estate are a legal set-off.^(x)

So, in *Thomson v. Thomson*,^(y) where thirty years had elapsed since the issuing of the letters of administration, an application for an inventory was denied, on the presumption that the estate had been properly administered.

If the executor or administrator show the petitioner to be not entitled to demand an inventory, or that his suit is brought in bad faith, the court will charge the costs of the proceeding on the petitioner, because, notwithstanding the law required the inventory, it was not for him to volunteer to compel its observance. When an executor or administrator violates his duty, the court will presume that there are enough of those interested in the matter to call him to account, and will not encourage a mere intruder in asserting his liability.

If the executor or administrator fail to appear on the day appointed by the summons, and file the inventory, or obtain further time for that purpose, by the above section, numbered 18, the surrogate must, upon proof of the personal service of the summons upon him, issue an attachment against him.

By the 67th section of the act of 1837,^(z) the tenth, twelfth and thirteenth sections, and sections sixteen to thirty-second, title thirteenth of chapter eighth, of the third part of the Revised Statutes, inclusive, apply to attachments issued by surrogates. These sections will be found at length at a preceding page of this work, in connection with the subject of the jurisdiction and powers of surrogates. From the slightest examination of them, it is apparent that their provisions are incompatible with the 18th section, at present under consideration. The attachment against an executor or administrator for not returning an inventory, must command the sheriff to commit the delinquent to the common jail of the county, there to remain until he shall return such inventory. He is not to be brought before the court to answer, as prescribed by the above enumerated sections from the Revised Statutes, but is to be committed to jail in the first instance. He cannot be set at liberty on bail, as provided for by those sections, but must be kept in custody until he file the inventory, or obtain his discharge under the above section, numbered 22. The reason of this may be, that his not returning an inventory is a palpable violation of the law

(u) "*Pitt v. Woodham*, 1 Hagg. 247."

(v) "*Bowles v. Harvey*, 4 Hagg. 241."

(w) "*Higgins v. Higgins*, 4 Hagg. 242."

(x) See Wms. on Exrs. 839, 840, and cases cited.

(y) 1 Bradf. Surr. Rep. 24.

(z) S. L. 1837, 535; 2 R. S. (4th ed.) 422, sec. 20; *Anle*, p. 8.

and of his duty, evident upon the records of the court, and not susceptible of explanation or excuse. Therefore, after having been formally and distinctly called upon to discharge this duty, upon his neglect or refusal there is a complete contempt, and imprisonment immediately follows. An objection which occurs to this construction, is, that the executor or administrator has no opportunity to dispute the service of the summons upon him, which is an essential preliminary to the granting of the attachment, before he is committed to jail. But the positive injunction of the statute cannot be got rid of on this ground, and the force of the objection can only apply to cause the surrogate to exact the most positive and certain proof of the due and personal service of the summons, before granting the attachment. If the surrogate have reason to believe that the executor or administrator is prevented from returning the inventory by sickness or accident, he may delay the issuing of the process; but on satisfactory proof being furnished of the service of the summons, in the absence of all excuses, the attachment must issue, and the delinquent must be committed to custody.(a)

By statute,(b) the attachment is to be in form similar to that used by the Court of Chancery, [now the Supreme Court,] it is presumed, in equity cases. An order for issuing the same must be entered. (For forms of the order and attachment, see Appendix, No. 48.)

The costs of the petitioner, including the fees of the surrogate, must be paid by the executor or administrator before he can be discharged from the attachment, and he is liable for the same personally, and they ought not to be allowed against the estate. And if he return an inventory, in compliance with the requisition of a summons, without further proceedings, the surrogate will grant an attachment against him if he refuses to pay the petitioner's costs.(c) The provisions of the statute expressly impose upon the executor or administrator the duty of making and returning an inventory, and the consequences of his disobedience to those provisions, should charge him personally, and ought not to be visited upon innocent parties interested in the property, which he has undertaken faithfully to administer.

By the 19th section, if the executor or administrator, after being committed to prison, neglect for thirty days to return the inventory,

(a) If, however, it should be considered that the sections of the Revised Statutes, enumerated in the 67th section of the Law of 1837, are paramount to the provisions of the 18th section under consideration, or that the attachment must be issued conformably to their requirements, then the attachment will command the sheriff to bring the delinquent before the surrogate to answer, and the surrogate must direct the penalty in which he shall give bond for his appearance, and on his appearance, interrogatories must be filed; and in case the offending party be adjudged guilty of the misconduct alleged, a fine must be imposed; and, inasmuch as the misconduct complained of will necessarily consist of the omission to perform an act or duty yet in his power to perform, by the 23d section, (2 R. S. 538; *Ante*, p. 9,) he must be imprisoned only until he shall have performed such act or duty, and paid the fine, and the costs and expenses of the proceedings. In this view of these provisions, if the delinquent, after such commitment, shall remain in prison for thirty days without filing the inventory, it is supposed that then the 19th and the subsequent sections of the 2d R. S. p. 85, will apply, and that thereupon his letters may be revoked.

(b) 2 R. S. 222, sec. 6, subdiv. 4; 4th ed. 420; *Ante*, p. 22.

(c) The proceedings upon such an attachment will, of course, be governed by the sections of the Revised Statutes above referred to. See *ante*, p. 22. The practitioner will find no difficulty in following their directions.

the surrogate may thereupon issue, under his seal of office, a revocation of his letters, reciting therein the cause of such revocation. An order for the issuing of the revocation must be entered, which should set forth concisely the prior proceedings against the executor or administrator, and direct the revocation to issue. (For forms of the order and of the revocation, see Appendix, No. 49.)

By the same 19th section, if the summons cannot be served personally, by reason of the executor or administrator absconding or concealing himself, the surrogate may issue, in like manner, a revocation of the letters testamentary or of administration. The most conclusive proof should be required that the summons to return an inventory could not be served, because of the executor or administrator absconding or concealing himself, before issuing a revocation of his letters on this ground; and although the statute does not prescribe any notice by advertisement to be given, it is submitted that the surrogate, in a case of doubt, may direct a notice to the delinquent, to be published in a newspaper, that unless he appear and return an inventory at a certain short day, his letters will be revoked. The order for issuing the revocation, and the revocation, in a case where the executor or administrator has absconded or conceals himself, should contain the proper recital of that fact. The letters having been revoked, the same section provides for the granting of letters *de bonis non*.

The 20th section prescribes the effect of the new letters of administration, or letters testamentary.

The 21st section provides, in every such case of revocation, for the prosecution of the bond given by the former executor or administrator, whenever directed by the surrogate. The surrogate's direction for the prosecution of the bond, is to be obtained on the application of the new executor or administrator. The proceeding is *ex parte*; but at least presumptive evidence should be furnished by the application, that the estate had suffered by reason of the misconduct of the former executor or administrator. There may be cases in which the filing of an inventory may be of great importance; but where the acts or omissions of the executor or administrator have not occasioned any injury to the estate, in such cases the prosecution of the bond merely for nominal damages ought not to be permitted; and this provision of the statute, requiring the surrogate's direction before prosecuting, seems to have been inserted to prevent unnecessary suits on these bonds. The surrogate's direction is given in the form of an order.

By the 22d section, an executor or administrator committed on an attachment for not returning an inventory, may be discharged, on his delivering upon oath all the property of the deceased under his control, to a person authorized by the surrogate to receive the same. This section does not require that the executor or administrator should pay the costs and expenses of the proceedings against him, in order to be discharged, pursuant to its provision. The appointment of a person to receive the assets, of course supersedes the delinquent, and he is entitled to be discharged from imprisonment on simply delivering over the property. He is, notwithstanding, still liable otherwise for such costs and expenses. Where an executor or administrator returns an

inventory, after compulsory proceedings against him, and continues to retain his office, the payment of the costs and expenses may be enforced, as has been seen, by attachment; but where he allows himself to be superseded, he cannot be held in custody after he has duly given up the property of the deceased under his control.

Of the Effect of one or more of several Executors returning an Inventory.

The article of the Revised Statutes relating to inventories, the different sections of which have formed the principal topics of consideration in this chapter, provides on this subject as follows:—

Sec. 23. Any one or more of the executors or administrators named in any letters, on the neglect of the others, may return an inventory; and those so neglecting, shall not thereafter interfere with the administration, or have any power over the personal estate of the deceased; but the executor or administrator so returning an inventory, shall have the whole administration until the delinquent return and verify an inventory, agreeably to the provisions of this article.(d)

Of returning further Inventories.

The following section of the statute provides for the returning of further inventories:—

Sec. 24. Whenever personal property, or assets of any kind not mentioned in any inventory that shall have been made, shall come to the possession or knowledge of an executor or administrator, he shall cause the same to be appraised in manner aforesaid, and an inventory thereof to be returned within two months after the discovery thereof; and the making of such inventory and return may be enforced in the same manner as in the case of the first inventory.(e)

The proceedings on making and returning a further inventory, and on compelling the return of such an inventory, must be similar to those in respect to a first inventory, and similar forms must be used.

How far the inventory filed by the executor or administrator is evidence for or against him, will be considered at a subsequent page of this work, in connection with the payment of the debts of the deceased.(ee)

In conclusion of the present subject, it is deemed proper to observe, that in the ecclesiastical courts in England, the parties who may be cited to exhibit an inventory and account, are not confined to the executor or administrator himself, or even to those who, upon the death of the executor or administrator, succeed to the representation of the original testator or intestate. Thus, in *Ritchie v. Rees*,(g) Sir John Nicholl held, that the representatives of a deceased administrator *cum testamento annexo*, although not at the same time those of the first testator, were liable to be called on for an inventory and account, upon a reasonable presumption being raised, that any part of the effects of the

(d) 2 R. S. 86; 4th ed. 272.

(e) 2 R. S. 86; 4th ed. 272.

(ee) See chap. 10.

(g) "1 Add. 158."

first testator had travelled into their hands: (h) the learned judge was further of opinion, that a party having an interest in the effects was entitled to call upon such representatives for the inventory, without first taking a *de bonis non* grant of the effects of the first testator. So the executors of a deceased executor, though not the personal representatives of the original testator, (there being an executor of the original testator still surviving,) are compellable to bring in an inventory of the effects of the original testator. (i)

Whether the jurisdiction of the Surrogates' Courts in this state is co-extensive with that of the ecclesiastical courts thus noticed, no case has as yet arisen to determine. It is reasonable to believe, however, that the English rule would be adopted and sustained here in a proper case.

CHAPTER VIII.

OF THE DUTIES AND LIABILITIES OF THE EXECUTOR OR ADMINISTRATOR IN RESPECT TO THE COLLECTION OF THE PERSONAL ESTATE OF THE DECEASED.

THE next duty of the executor or administrator is to collect all the goods and chattels of the deceased. For that purpose, the law invests him with large powers and authority. As representative of the deceased, it has been seen, he has the same property in the effects as the principal had when living; he has also the same remedies to recover them. (a) Within a convenient time after the testator's death, or the grant of administration, he has a right to enter the house descended to the heir, in order to remove the goods, (b) provided he do so without violence; as, if the door be open, or at least the key be in the door; and, although the door of entrance into the hall or parlor be open, he cannot, therefore, justify forcing the door of any chamber to take the goods contained in it; but is empowered to take those only which are in such rooms as are unlocked, or in the door of which he shall find a key. He has, also, a right to take deeds and other writings, relative to the personal estate, out of a chest in the house, if it be unlocked, or the key be in it; but he has no right to break open even a chest. If he cannot take possession of the effects without force, he must desist, and resort to his action. (c) On the other hand, if the executor or administrator on his part be remiss in removing the goods within a reasonable time, the heir may distrain them as damage feasant. (d)

(h) "See *Holland v. Prior*, 1 M. & K. 245, 246, 247."

(i) "*Gale v. Lattrell*, 2 Add. 234." See Wms. 840.

(a) "2 Black. Comm. 510."

(b) "Vid. Harg. Co. Litt. 56 b."

(c) "Off. Ex. 92, 93; 11 Vin. Abr. 267; Shep. Touch. 470."

(d) See Toller on Exrs. 250, and note.

"With respect to such personal actions as are founded upon any obligation, contract, debt, covenant, or other *duty*, the general rule has been established from the earliest times; that the right of action on which the testator or intestate might have sued in his lifetime survives his death, and is transmitted to his executor or administrator.^(e) Therefore, it is clear that an executor or administrator shall have actions to recover debts of every description due to the deceased, either debts of record, as judgments, statutes or recognizances, or debts due on special contracts, as for rent; or on bonds, covenants and the like, under seal; or debts on simple contracts, as notes unsealed, and promises not in writing, either express or implied.^(ee)

"The executor or administrator is the only representative of a deceased that the law will regard in respect of his personalties, and no words introduced into a contract or obligation can transfer to another his exclusive rights derived from such representation. By the law, all personalties and rights to the personalties are given to the executors or administrators, as all realties and rights to realties are given to the heir, the executors or administrators being representatives of a man in respect of his personalties, in like manner as the heir in respect of the realties; therefore, if a man enters into an obligation to pay to another, or his heirs, a sum of money, his executors or administrators, and not his heirs, shall have it.^(g)

"The representation of the deceased in matters of contract by his executor or administrator, is so complete, that, generally speaking, it is not necessary, in order to transmit to the executor or administrator a right of enforcing a contract, that he should be named in the terms of it. Thus, if money be payable to B., without naming his executor, yet his executor or administrator shall have an action for it.^(h) So, if money be payable to A. or his assigns, his executor shall take it; for he is assignee in law.⁽ⁱ⁾ But if an annuity be given to B. without saying to his executors and administrators, during the life of the testator's wife, upon condition that he be civil to the wife, and B. dies before the wife, his executor shall not have it; for it was personal to B."^(k)

By the second section of the act concerning "the rights and liabilities of executors and administrators,"^(l) actions of account and all other actions upon contract may be maintained by executors, in all cases in which the same might have been maintained by their testators.

By the third section of the same act, administrators shall have actions to demand and recover the debts due to their intestate, and the personal property and effects of their intestate, in the same manner as executors.

(e) "1 Saund. 216 a, n. (1) to *Wheatley v. Lane*. The right of executor to sue is extended to administrators, by Stat. 31 Edw. III, sec. 1, ch. 11.

(ee) "Went. Off. Ex. 159, 14th ed.; Com. Dig. Administration, (B. 13.); Toller, 157; Wms. 664-5.

(g) *Devon v. Pawlett*, 11 Vin. Abr. 133, p. 627. See Wms. on Exrs. 665-6.

(h) "Com. Dig. Admon. (B. 13.)

(i) "*Pease v. Mead*, Hob. 9; Wentw. Off. Ex. 215, 14th ed. See, also, *Iremonger v. Newsam*, Latch. 261; 1 Roll. Abr. 915; Executors, (X.) pl. 1.

(k) "*Neal v. Hanbury*, Prec. Chan. 173. See, also, *Barford v. Stuckey*, 1 Bing. 225." Wms. on Exrs. 668.

(l) 2 R. S. 113; 4th ed. 298.

"But it was a principle of the common law, that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person to whom, or *by* whom the wrong was done. Thus, where the action was founded on any malfeasance or misfeasance, was a tort, or arose *ex delicto*, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a water-course, obstructing lights, escape, and many other cases of the like kind, where the *declaration* imputes a tort done either to the person or the property of another, and the *plea* must be not guilty, the rule was, *actio personalis moritur cum persona*.(m) But this rule has received considerable alteration, and now, by statute, it is provided, that executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased in his lifetime.(n)

And further, that any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate, who in his lifetime shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of any such person.(o)

By the act of the legislature, known as the Code of Procedure, passed 12th April, 1848, the forms of all actions and suits, existing before the act took effect, were abolished.(p)

The article of the Revised Statutes, relative to "suits by and against executors and administrators,"(q) further provides as follows:—

Sec. 1. For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrongdoer; and, after his death, against his executors or administrators, in the same manner, and with the like effect in all respects, as actions founded upon contracts.

Sec. 2. But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator.(r)

(m) "From a misconception or misapplication of this principle, it was formerly doubted whether *assumpsit* would lie either for or against an executor; because the action, it was said, was in form *trespass* on the case, and therefore supposed a *wrong*, and in substance was to recover damages only in satisfaction of the wrong. *Norwood v. Read*, Plowd. 180; *Pinchon's case*, 9 Co. 86 b, 89 a; *S. C.*, Cro. Jac. 294, (nom. *Legate v. Pinchon*;) *Slade v. Morley*, Yelv. 20; *Berwick v. Andrews*, 2 Ld. Raym. 974, by Powell, J.; 1 Saund. 216 a, note (1)." Wms. 668.

(n) 2 R. S. 113; 4th ed. 298, sec. 4.

(o) *Ib.* sec. 5.

(p) Code, sec. 69, (sec. 62.)

(q) 2 R. S. 447; 4th ed. 690.

(r) 2 R. S. 448.

With respect, however, to actions for injuries to the person of the testator or intestate, the "act requiring compensation for causing death by wrongful act, neglect or default," passed December 13, 1847,^(s) as amended by the act of the 7th April, 1849,^(t) provides as follows:—

Sec. 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; and although the death shall have been caused under such circumstances as amount in law to felony.^(u)

Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, provided that every such action shall be commenced within two years after the death of such person; but nothing herein contained shall affect any suit or proceeding heretofore commenced, and now pending in any of the courts of this state.^(v)

The "act in relation to suits brought by and against executors," passed April 2d, 1838,^(w) provides as follows:—

"In actions brought by executors, it shall not be necessary to join those as parties to whom letters testamentary shall not have been issued, and who have not qualified."

By sec. 21, of the act concerning "estates for years," &c.,^(x) the executors or administrators of every person to whom any rent shall have been due and unpaid at the time of his death, may have the same remedy by action or by distress, for the recovery of all such arrears, that their testator or intestate might have had, if living.

By sec. 22, of the same act, when a tenant for life, who shall have demised any lands, shall die on or after the day when any rent became due and payable, his executors or administrators may recover from the under-tenant, the whole rent due; if he die before the day when any rent is to become due, they may recover the proportion of rent which accrued before his death.

By sec. 23, of the same act, as modified by chapter 274 of the Laws

(s) S. L. 1847, Vol. II, p. 575.

(t) S. L. 1849, 388.

(u) 2 R. S. (4th ed.) 563.

(v) *Ib.*

(w) S. L. 1838, ch. 149, p. 103; 2 R. S. (4th ed.) 298.

(x) 1 R. S. 747; 4th ed. (2d vol.) 154.

of 1846, the grantees of any demised lands, tenements, rents or hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor had, or might have had, if such reversion had remained in such lessor or grantor.

By sec. 24, the lessees of any lands, their assigns or personal representatives, shall have the same remedy by action or otherwise against the lessor, his grantees, assignees, or his or their representatives, for the breach of any covenant or agreement in such lease contained, as such lessee might have had against his immediate lessor, except covenants against incumbrances, or relating to the title or possession of the premises demised.

And, by sec. 25, the provisions of the two last sections extend as well to grants or leases in fee, reserving rents, as to leases for life and for years.

Suits at law may be maintained by executors or administrators, as such, on promissory notes, &c., made to them in their representative capacity, where the fund sought to be recovered will be assets; and counts on such notes may, it seems, be joined with counts on promises to the testator or intestate.(y)

Administrators may sue in their own right for causes of action accruing to them after the death of their intestate.(z) When a contract is made with an executor or administrator, personally, after the death of the testator or intestate, or where money is received by the person sued, after such death, the executor or administrator may sue, either in his own name or as executor or administrator.(a)

Under the Code, where the plaintiff sues as executor or administrator, it is not necessary to make profert of letters testamentary or of administration. The allegation of the fact, that the plaintiff is such executor or administrator, is sufficient.(b)

The authority thus vested in the executor or administrator is for the benefit of the estate; and it is incumbent on him to avail himself of his powers, with reasonable diligence, in the discovery and collection of the effects of the deceased. Therefore, if by unduly delaying to bring an action, the executor or administrator has enabled a creditor of the deceased to avail himself of the Statute of Limitations, the executor or administrator will be personally liable.(c)

In *Schultz v. Pulver*,(d) it was held, that if debts collectable are not collected within a reasonable time after the granting of letters testamentary or of administration, the executor or administrator is person-

(y) *Fry v. Evans*, 8 Wend. 530; *Bogert v. Hertell*, 4 Hill, 492.

(z) *Mercein v. Smith*, 2 Hill, 210.

(a) *Merritt v. Seaman*, 6 Barb. Sup. Ct. Rep. 330.

(b) *Welles, executor, &c. agst. Webster*, 9 Howard's Prac. Rep. 251.

(c) "*Hayward v. Kinsey*, 12 Mod. 573;" Wms. on Exrs. 847. See, also, *Darel v. Eden*, 3 Dessau. 245.

(d) 3 Paige's Ch. Rep. 182; *S. C.*, on Appeal, 11 Wend. 361.

ally responsible for the amount of such debts to creditors, or to those entitled to the proceeds of the estate, in the order of distribution, although the debts have not been lost by the delay, and no improper motives are imputable to the executor or administrator; and that an administrator here is bound to take measures for the collection of a demand due the estate he represents, from a debtor residing in another state, either by obtaining himself, or employing an agent there to obtain letters of administration, and instituting proceedings by virtue thereof.

That case was an appeal from a decree of a surrogate, and the circumstances were as follows:—In December, 1828, the appellant was cited to account before the surrogate of Columbia, as the administrator of the estate of his father, who died about the first of January, 1823. He appeared and accounted. The only matter in controversy related to two sealed notes given to the decedent by one A. Feltz, a son-in-law of the decedent, for which the administrator contended he was not liable to account. One note was for \$600, payable on demand, with interest from the 27th February, 1819; the other for \$50, payable in like manner, with interest from the 11th June, 1821. These notes were not specified in the inventory of the decedent's estate, which was taken the 9th June, 1823; but at the foot thereof, the administrator made and signed a memorandum, to the effect that the decedent held a note against A. Feltz, as he understood and believed, for \$650, which he had not been able to find. The widow of the decedent survived him; she died the 28th March, 1826, and after her death the notes in question were found in a trunk which had belonged to her. Feltz resided in Pennsylvania, where he had a farm of three hundred acres, stocked with sheep, &c., and it was conceded, before the surrogate, that he was abundantly able to pay the notes in question. He and his wife attended the funeral of his mother-in-law, from her late residence in this state, and remained in the neighborhood for several days. The notes remained unpaid, and the administrator contended, before the surrogate, that he was under no obligation to follow Feltz into Pennsylvania to collect the notes, and that common decency forbade a prosecution against him upon the occasion of his being in this state. He also offered the notes to the respondents, who refused to accept them. The surrogate held the administrator responsible for the amount of the notes, with the interest thereof, and accordingly made a decree, directing him to pay to the respondents their several distributive shares, and ordered him to pay the costs of the proceeding.

The administrator appealed to the Chancellor, who affirmed the decree of the surrogate, except as to the costs. Whereupon the administrator appealed to the Court of Errors, where the decree of the Chancellor was affirmed; and Mr. Justice Nelson, in delivering the opinion of the majority of the court, urges the duty and liability of executors and administrators, in respect to the collection of the assets, in terms of great strictness and severity. After showing that it was clearly practicable for the administrator to have sued and collected the notes in question, in the State of Pennsylvania, he says:—

“The notes are not negotiable, being sealed instruments, and there

was a subscribing witness to their execution; and, though lost, there could have been no great embarrassment in enforcing the collection.(e) But yielding, for the sake of argument, that the administrator was not bound to take any steps in the matter during the three years, and until the notes were found; after that, he should have immediately attended to the collection. Two years and a half more elapsed prior to the institution of this proceeding against him; during all which time he took no measures on the subject. The utter remissness of duty, and disregard of the interest of the estate, in this particular, are calculated to excite a suspicion of collusion between him and Feltz. No prudent man would have thus neglected his own concerns, and less diligence and attention can, in no instance, be indulged in an administrator; the course of the decisions would seem to exact a greater activity and devotion in the execution of their trust.(g)

"The general rule is, that all debts in the inventory, not designated as *desperate*, shall be accounted assets in the hands of the executor or administrator; and, in order to escape such accountability, he must show that they are desperate, or at least must show a demand and refusal.(h) The notes in this case are inventoried as a part of the assets, with the remark that they could not be found. That explanation, after March, 1826, was no longer applicable to them. In the case of *Lawson v. Copeland*,(i) an executor was charged with a bond debt, for neglecting to take legal steps to collect it; in consequence of which, it was lost. So, in *Powell v. Evans*,(k) he was charged for neglecting to call in money lent out by the testator on personal security, and the debtor became insolvent. In *Caffrey v. Darley*,(l) trustees were charged with a loss occasioned by their negligence, in not collecting £800, payable to them by annual instalments, for their *cestui que trust*. In this case, it was conceded by the counsel and court, that the trustees were not influenced by any impure motives. The Master of the Rolls says, it would be very dangerous, though no fraud could be imputed to the trustees, and no kind of interest or benefit to themselves was looked to, to lay down this principle; that trustees might, without any responsibility, act as these did: in eight years, within which time the whole money ought to have been paid, receiving only £250, and taking no steps as to the remainder. It would be an encouragement to bad motives, and they cannot always be detected. Now, if in all these cases the executor or trustee was chargeable for debts through negligence of duty in the collection of them, and in cases, too, where there was no hope of reimbursement, as the debtors were insolvent, it seems to me we should not hesitate as to the conclusion in this case, marked at least with equal neglect of duty; and where reimbursement is certain, we should hold the appellant personally responsible for the debt, and thereby add to the motive of duty as administrator, that of personal interest, in his movements hereafter on the subject. Though

(e) 3 T. R. 153, and n. c.; 3 Cowen, 303.

(g) 4 Johns. Ch. R. 284, and cases there cited.

(h) 1 Salk. 296; Bul. N. P. 140; 3 Bac. 47.

(i) 2 Brown's C. C. 156.

(k) 5 Vesey, 839.

(l) 6 Ves. 487.

I should regret to charge an administrator who has acted in good faith, and intended fairly and fully to discharge his duty—nor will the law authorize us to do so, if these intentions have been directed by a reasonable judgment in the matter—yet, it should be known, that if the property is wasted through their carelessness and want of proper attention, or if the debts are not collected within a reasonable time after letters testamentary or of administration, either by personal application or suit, which by such means may have been collected, whether the debts have been lost by such delay or not, or whether their motives may have been pure or not, the law holds them personally responsible to the creditors and distributees. There is nothing hard or unjust in this principle. It is only exacting of these representatives that diligence and attention to the business of others, voluntarily assumed upon themselves, which they should, and which every discreet man would bestow upon his own."

Of the Limitation of Actions in favor of the Estates of Deceased Persons.

The Code of Procedure provides as follows:—

Sec. 102. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death.

Sec. 104. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his heirs or representatives may commence a new action within one year after the reversal.^(m)

Sec. 121. No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest.⁽ⁿ⁾

The administrator of a deceased plaintiff may have leave to continue the action, if the pleadings show a cause of action which survives, without reference to any matters of defence set up by the defendant. Thus, where the defendant read affidavits, showing that the original plaintiff had assigned the demand before the commencement of the action, it was considered that the facts stated in the affidavits went to the foundation of the action, but were not proper to be considered on the motion; and, as the pleadings showed a cause of action which survived, the administrator was allowed to continue the action, with leave to the defendant to amend his answer by setting up the facts alleged in his affidavits.^(o)

^(m) Voorhies' Code, (2d ed.) 78.

⁽ⁿ⁾ Ib. p. 96. It seems that the supplemental complaint can only be put in on motion. Ib. p. 97.

^(o) *Wing v. Ketcham*, 3 How. Prac. Rep. 385; 2 Code Reporter, 7.

The article of the Revised Statutes concerning "suits by and against executors and administrators," provides as follows:—

Sec. 9. The time which shall have elapsed between the death of any person, and the granting of letters testamentary or of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters, shall not be deemed any part of the time limited by any law for the commencement of actions by executors or administrators.(p)

In an action by an executor or administrator, before the Code, where twelve months had elapsed since the death of the testator or intestate, and the Statute of Limitations was pleaded, it seems that it was not necessary for the plaintiff to reply *specialty* the time allowed by law for the bringing of the suit, but he might reply generally.(q) The above section, numbered 9, provides that in actions by executors or administrators, a certain time, not exceeding twelve months from the death, shall not be deemed any part of the time limited by any law for the commencement of actions.(r) In other words, the time shall be the same, viz., six years; but this shall be reckoned exclusively of certain time which the legislature thought ought not to be counted. "The plea," it was said, "is to be read, in effect, as if it said six years, &c., exclusive of such and such time. It is as if the statute had said such a plea shall be so read or construed." In *Huntington v. Brinkerhoff*,(s) a special replication was spoken of, as proper under sec. 9, upon the analogy to the practice of replying disability. The point was not before the court, and the analogy is incomplete. While a general and direct issue seems to be admissible on principle, and conformable to the peculiar language of the Revised Statutes, it is more desirable on account of its simplicity.(t)

Under the system of pleading prescribed by the Code, the allegation of new matter, as of the Statute of Limitations, in the answer which corresponds with the plea in the case quoted, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require.(u) A reply is not provided for. Indeed, a reply is not proper in any case, unless the answer sets up as a defence a "counter claim," as defined by sec. 150 of the Code.(v)

No exception to the Statute of Limitations can be claimed, unless it is expressly mentioned in the statute. But the statute begins to operate only from the time a right to demand the thing in question vests in some one. A cause of action cannot be said to "accrue," within the terms of the statute, until there is some person in existence capable of suing, or at least some person to whom, or against whom, it may accrue. When the act, which gives the cause of action, happens after the death of the person to whom the cause of action is intended to be given, until a representative of the deceased is appointed, the cause of

(p) 2 R. S. 448; 4th ed. 490.

(q) *Howell v. Babcock's Exr.*, 24 Wen. 488.

(r) See *Bucklin v. Fbrd*, 5 Barb. Sup. Ct. Rep. 393-397.

(s) 10 Wen. 284.

(t) 24 Wen. 490, per Cowen, J.

(u) Code, sec. 168; Voorhies, (2d ed.,) 187.

(v) *Williams agst. Upton*, 8 Howard's Prac. Rep. 205; *Simpson agst. Loft and others*, Ib. 234.

action does not accrue, or, in fact, exist.^(w) Accordingly, in *Bucklin v. Ford*,^(x) which was an action of assumpsit, brought by the plaintiff, as an administrator of John Bucklin, junior, deceased, against the defendant, as executor of John Bucklin, senior, deceased, for taking and converting goods, chattels and things in action, bills, bonds, &c., belonging to the plaintiff's intestate, of the value of \$2,000, the declaration alleging a promise to pay the amount, and the defence was the Statute of Limitations, as a bar to the plaintiff's action; and it appeared from the evidence, on the hearing before the referee, that the plaintiff's intestate died in January, 1828, and that, soon afterwards, the property for which the action was brought, came into the hands of John Bucklin, senior, the defendant's testator; that John Bucklin, senior, died in December, 1838; that letters of administration upon the estate of John Bucklin, junior, were granted to the plaintiff, on the 4th of November, 1836, and that the suit was commenced in April, 1842. The Supreme Court held, that the Statute of Limitations was no bar to the action; that the statute commenced running only from the granting of the letters of administration, and not from the receipt of the property; and that it was sufficient, if the action was brought within six years after the granting of letters of administration. And the court confirmed the report of the referee for \$1,760 in favor of the plaintiff.

Of the Enforcement of Judgments obtained by the Deceased in his Lifetime.

The second title of the ninth chapter of the third part of the Revised Statutes, contains the following provisions:—

Sec. 2. Writs of *scire facias* shall be issued in the cases not otherwise provided by law, to revive a judgment in favor of the personal representatives of any deceased plaintiff, or to continue a suit by or against the representatives of either party, who shall have died in the progress thereof.^(y)

Sec. 22. No declaration shall be required to be filed upon the *scire facias*; but where executors or administrators are plaintiffs in any such writ, they shall make profert of their letters testamentary or of administration, in the *scire facias*, in the same manner as now practiced in the declaration. And the defendant shall plead to such writ in the same manner as to a declaration.^(z)

These provisions are regarded as repealed by the Code of Procedure; not, indeed, in express terms, but by strong and conclusive implica-

^(w) The statute in relation to executors and administrators does not interfere with this principle. The section providing that the term of eighteen months, after the death of any testator or intestate, shall not be deemed any part of the time limited by law for the commencement of actions against his executors or administrators, (2 R. S. 448; 4th ed. 690, sec. 8,) and the above ninth section of the statute, are only applicable to cases where the statute has commenced running before the death of the testator or intestate. The year and a half in the one case, and the year in the other, after his death, are not to be taken into the account in the six years in which the action is required to be brought; thereby extending the statute in the latter case to seven years, and in the former to seven and a half years. But it does not touch the question as to what shall be deemed, in cases of this kind, the accruing of the cause of action.

^(x) 5 Barb. S. C. R. 393.

^(y) 2 R. S. 576; 3d ed. 671.

^(z) 2 R. S. 580; 3d ed. 674.

tion.(a) By section 69 of the Code, the forms of all actions and suits theretofore existing were abolished, and one form of action for the enforcement or protection of private rights, and the redress of private wrongs, denominated a civil action, was substituted. By section 468, all statutory provisions, inconsistent with the Code, are repealed; and it is declared, that all rights of action, given or secured by existing laws, may be prosecuted in the manner provided by the act. The writ of *scire facias*, in all cases, is in the nature of an action, because the defendant may plead to it; for, whenever the defendant may plead to any writ, whether original or judicial, it is laid down, it is in law an action; and though, to revive a judgment, it is a judicial writ to continue the effect of, and "have execution" of the former judgment; yet it is in the nature of an action, because the defendant may plead any matter in bar of the execution upon the judgment.(b) The definition of an action, given in the Code,(c) it is considered, is sufficiently comprehensive to include the proceeding by *scire facias* to have execution, &c. It is a proceeding in a court of justice, by which the plaintiff prosecuted the defendant for the enforcement of a right. If the judgment has not been satisfied, it is the right of the representatives of the deceased judgment creditor to have satisfaction thereof by execution. A *scire facias* to revive a judgment, or rather warning the defendant to show cause why the plaintiff should not have execution thereof, being regarded as an action, the 69th section of the Code, above quoted, and the portion, above quoted, of the 468th section, are applicable to the case; and the remedy, by a writ of *scire facias*, provided by the above sections of the Revised Statutes, no longer exists.(d)

There would seem to be no difficulty in resorting to the general remedy, by action given by the Code to obtain the relief provided by these sections of the Revised Statutes. The summons may be in the usual form, and the complaint, in stating the facts constituting the cause of action, will state the same facts, substantially, which were formerly stated in the writ of *scire facias*. The proper relief will then be

(a) The learned compilers of the last (4th) edition of the Revised Statutes, seem to consider these sections of the Revised Statutes as expressly repealed by the 428th section of the Code (See 2 R. S. (4th ed.) 808.) The 428th section of the Code is contained in the second chapter, of the 13th title, of the second part of the Code. That chapter is entitled, of "actions in place of *scire facias*, *quo warranto*, and of informations in the nature of *quo warranto*," and declares that the writ of *scire facias*, the writ of *quo warranto*, &c., are abolished, and that the remedies heretofore obtainable in those forms, may be obtained by civil actions under the provisions of this chapter, and proceeds to make provisions for actions in the place of the former *scire facias*, to vacate a charter of incorporation for fraud in obtaining such charter, or to vacate letters patent for fraud, mistake, &c., but does not anywhere make provisions applicable to the former remedy, by *scire facias*, to revive a judgment after the death of the plaintiff. The 428th section is, therefore, probably to be understood as abolishing the writ of *scire facias* in those cases only in which a substitute is provided by that chapter. If the above recited sections of the Revised Statutes are repealed, such repeal is effected by construction, and the operation of other provisions of the Code. Those sections might, therefore, well have been retained in the 4th edition of the Revised Statutes, under their appropriate head, as sections which secured remedies, under proceedings by *scire facias*, which are not specifically provided for in the Code of Procedure.

In *The Catskill Bank* agst. *Sanford*, (4 Howard's Prac. Rep. 100, 101,) it was considered that the 428th section of the Code, of itself, abolished the writ of *scire facias* in all cases.

(b) *Foster's Writ of Scire Facias*, p. 13.

(c) Sec. 2.

(d) See *Cameron and McKay* agst. *Young*, 6 Howard's Prac. Rep. 372, and cases cited.

demand, viz.: that the plaintiff have execution of the judgment. The defendant, by answer, can make any defence which he was allowed to make, by plea, to the writ, or the declaration contained in the writ. The judgment, in effect, will be the same as under the superseded practice, and the lien upon land will be preserved. There is nothing in the system of the Code conflicting with this practice. The 71st section, prohibiting an action upon a judgment rendered in certain courts between the same parties, has not any application. The parties to the action, to have execution issued upon the judgment, will not be the same parties as those to the judgment.(e)

Of Continuing Suits Commenced, and of Enforcing Judgments obtained by a former Executor or Administrator.

The act relative to "the rights and liabilities of executors and administrators," provides as follows:—

Sec. 14. No suit that may have been commenced by any executors or administrators who shall die, be removed or superseded, or who shall become incapable of acting, shall be abated thereby, but may be continued by the co-executor or administrator, if there be any; and, if there be none, by and in the name of the person who shall succeed the executor or administrator so dying, removed, superseded or becoming incapable, in the administration of the same estate.(g)

Though one who succeeds another in the administration of an estate may continue a suit commenced by his predecessor, he has an election, and cannot be compelled to do so against his will.(h)

The third title, of the 8th chapter, of the third part, of the Revised Statutes, entitled "of suits by and against executors and administrators, and against heirs, devisees and legatees," contains the following provisions:—

Sec. 13. Any subsequent executors or administrators shall have execution upon any judgment that may have been recovered by any person who preceded them in the administration of the same estate, within one year from the time of the docketing of such judgment, without reviving the same by *scire facias*, and without any other proceeding to give notice to the defendant in such judgment.(i)

By Sec. 471, [sec. 390,] of the Code, the chapter mentioned of the Revised Statutes is not affected by that statute.(k)

Of Set-offs in Actions by Executors or Administrators.

The act relative to "pleadings and set-offs," provides as follows:—

Sec. 37. [Sec. 23.] In suits brought by executors and administrators, demands existing against their testators or intestates, and belonging to the defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased.

In a suit by an administrator upon a cause of action which arose

(e) See 6 Howard's Prac. Rep. 375.

(g) 2 R. S. 115; 4th ed. 300.

(h) *Bain, Adm'r, &c. v. Pine*, 1 Hill, 615. See, also, *Campbell v. Bowne*, 5 Paige, 34.

(i) 2 R. S. 449; 4th ed. 691.

(k) See Code, Voorhies', (3d ed.) 443.

after the death of the intestate, the defendant cannot set off a debt due to him from the intestate, *(l)* and this, even though such debt existed at the time of the death of the intestate. *(m)*

Where, in an action by an administratrix, the defendant sought to set off the amount of a note made by the intestate and indorsed for his accommodation by the defendant, which the defendant had paid after the intestate's death; it was held not a demand existing against the intestate, *at the time of his death*, within the above provision of the statute, and therefore not a proper subject of set-off. *(n)*

It may here be observed, that there are some cases where an executor or administrator, although he has an interest in a chose in action, is not entitled to the remedy: Thus, where one of two joint obligees, covenantees or partners die, the action on the contract must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately: For example, two joint-merchants appoint a person to be their factor; one dies, leaving an executor; this executor and the survivor cannot join in an action against the factor; for the remedy survives, though not the duty; and therefore, on the recovery, the survivor must be accountable to the executor for that; and the general rule is now settled, that though the right of a deceased partner devolves on his executor, yet the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased. *(o)*

For certain purposes, the partnership continues; and the surviving partner, in virtue of the confidence originally reposed in him by his co-partner, retains the right, as the sole acting manager of the joint concern, to collect the moneys due, and convert the property of the firm into money, and pay the debts. *(p)* And the representatives of the deceased partner cannot take the closing up of the affairs out of the hands of the survivor, if he is perfectly responsible, and proceeds with fairness and due diligence, in the discharge of that duty. *(p)*

Nor will a court of equity appoint a receiver of the assets and effects of the firm, and thus deprive the surviving partner of his right to close up its affairs, if such surviving partner is responsible and acts in good faith. *(q)*

Upon the dissolution of a partnership by the death of one of the co-partners, the personal representatives of the deceased member of the firm are, however, entitled to have the stock on hand sold and converted into money, so that the share of the co-partnership funds belonging to them may be realized, without any unnecessary delay. *(r)*

(l) *Fry v. Evans*, 8 Wen. 530.

(m) *Mercein v. Smith's Adm'r*, 2 Hill, 210. See, also, *Hill's v. Tallman's Adm'r*, 21 Wen. 674; *Merritt v. Seaman*, 6 Barb. Sup. Ct. Rep. 330.

(n) Wms. 1585, and cases cited; *Thomson v. Thomson*, 1 Bradf. Surr. Rep. 24, 34; *Hutchinson v. Smith*, 7 Paige, 35.

(o) *Phillips v. Atkinson*, 2 Bro. Ch. 272; 3 Kent Comm. 57.

(p) 7 Paige, 35.

(q) *Evans v. Evans*, 9 Paige, 178.

(r) *Evans v. Evans*, *supra*. "The executrix," says the Chancellor, "if she deems it for her interest, has a right to insist that the stock on hand shall at once be sold for cash; so that the remaining debts of the firm may be paid off, and the business brought to a close as soon as possible."

Again, where two have the legal interest in the performance of a contract, though the benefit be only to one of them, upon the death of the latter the remedy survives, and the executor or administrator of the deceased cannot be made a party or sue separately.^(s)

It follows, that where a contract is made jointly with several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representative of those who died before him cannot be joined.^(s)

But if the interest of the covenantees is several, and one of them dies, his executor may maintain a separate action on the covenant, notwithstanding the other covenantee be living; and if the *interest* be several, it shall make no difference that the *language* of the covenant is joint.

On the other hand, wherever the interest of the covenantees is joint, the rule of survivorship, above stated, will be enforced, although the covenant be in terms joint and several.

The rule is the same with respect to remedies, under the system previous to the Code, in form *ex delicto*, as those in form *ex contractu*; therefore, if one or more of several parties jointly interested in property, at the time an injury was committed, is dead, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately.^(t)

The Code of Procedure provides that every action must be prosecuted in the name of the real party in interest; except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted.^(u) But this provision has not varied the rules of law, above laid down, in respect to the collection of claims in which the decedent was interested, with other persons, survivors. Where the interest is joint, especially in the case of partners, the survivor alone is entitled to maintain actions for debts due the firm. Such debts are a part of the assets of the partnership, and when collected, are to be applied, in the first instance, to the payment of the debts of the partnership.^(v) The interest of the executor or administrator of the deceased partner is indirect, remote and contingent, depending upon whether the assets of the firm are sufficient for the payment of its debts. The balance of the partnership assets, after all the debts have been discharged, is the only thing in which the executor or administrator has any individual right of property for the exclusive benefit of the estate of his testator or intestate. If he should be joined, as a party plaintiff, with the surviving partner, in a suit on a chose in action due the partnership, the money, when collected, could not go into his hands, nor could it be divided between him and the surviving partner. It must all be paid to the surviving partner. The executor or administrator of a deceased partner, therefore, is not a real party in interest in actions on claims due the partnership.

(s) Wms. 1585, and cases cited.

(t) Wms. 1580, and cases cited.

(u) Code, secs. 111, 113; Voorhies, (3d ed.,) 81, 85.

(v) *Hutchinson v. Smith*, 7 Paige, 26, and cases cited,

And with respect to joint obligees, covenantees or parties jointly interested in the recovery of damages for injuries to property, the same rule of survivorship still holds. The interest in the obligation or covenant, or in the damages sued for, passes, for the purposes of collection, to the survivor, and when he has collected the judgment, he is accountable to the executor or administrator of the deceased for his proportional share. In equitable actions under the Code, as before the Code, all the parties in interest must be joined as plaintiffs.

In actions at law, where there were several executors or administrators, the practice formerly was to bring the suit, in the first place, in the name of all; and, if either of them was unwilling to have the suit prosecuted in his name afterwards, the one who had instituted the suit might then, upon a summons, have a judgment of severance, and continue the suit in his own name only.^(w) And, in the Court of Chancery, if one of the executors or administrators, who was a necessary party, refused to join in the suit as a co-complainant, the proper course was to make him a party defendant; stating in the bill the fact that he would not consent to be a complainant in the suit.^(x) And now, by the Code "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."^(y)

If the deceased died possessed of public or corporate funds or stocks, the executor or administrator is entitled to have them transferred to himself, or to such person as he shall appoint, on presenting to the government officer, or to the bank or other company, a certificate of the surrogate that letters have been granted to him. And the public officer or the bank or other company, has no right to inquire into the disposition to be made of the property, but is bound to transfer the stock on the mere production of the proper evidence of the due appointment and qualification of the executor or administrator. If there be a refusal, the official functionary, or the institution, will become liable to the executor or administrator for damages.^(z) (For form of the certificate of the surrogate, see Appendix, No. 50.) Money of the deceased, on deposit in a bank, is to be collected in the same manner.

Where the deceased, having in his lifetime contracted for the purchase of goods, dies before the time of the delivery, his executor or administrator may enforce the performance of the contract and the delivery of the goods, and he may receive the goods which, at the time of the death, are in transit to the purchaser, and the right of stoppage *in transitu* does not attach on the death of the purchaser, if his estate was solvent.^(a)

It may here be mentioned, that, by the death of a master, his servant is discharged; and, therefore, the executors or administrators of the

(w) 2 Walf on Parties, 1530; Went. Off. of Ex. 212; 10 Paige, 289.

(x) *Thompson v. Graham*, 1 Paige, 384; *Tooker v. Oakley*, 10 Paige, 288, and cases cited.

(y) Code of Procedure, sec. 119.

(z) See Toller on Exrs. 254.

(a) *MacTier v. Frith*, 6 Wend. 124-5.

former can bring no action to enforce the contract of service after his death.^(b) Nor has the executor or administrator any interest in an apprentice bound to the deceased.^(c) The apprenticeship is essentially dissolved, for the end and design of it, as a personal trust, cease; but the assets in the hands of the personal representatives of the master are chargeable with the necessary maintenance of the infant apprenticed.^(d)

A special administrator or collector^(e) has authority to collect the goods, chattels, personal estate and debts of the deceased, and to secure the same at such reasonable expense as the surrogate shall allow; and for those purposes, he may maintain suits as administrator.

The Revised Statutes provide as follows:—

Sec. 40. Upon letters testamentary, or of administration, being granted, the power and authority of such collector shall cease; but any suit brought by him may be continued by the executor or administrator, in the name of such collector, which he shall not have power to discontinue or release. And such collector shall, on demand, deliver to the executor or administrator, all the property and money of the deceased in his hands, and shall render an account, on oath, to the surrogate, of all his proceedings, upon being cited for that purpose, or without such citation. Such delivery and account may be enforced by an order of the surrogate, and by attachment to be issued by him, as in other cases of administrators.^(g)

The proceedings referred to, against administrators, will be found considered in a subsequent chapter of this work, in connection with the subject of accounting by executors or administrators.^(h)

CHAPTER IX.

OF THE DISPOSAL OF THE ESTATE OF THE DECEASED BY THE EXECUTOR OR ADMINISTRATOR.

THE following sections of the statute relate to the disposal of the estate by the executor or administrator:—

Sec. 25. If any executor or administrator shall discover that the debts against any deceased person, and the legacies bequeathed by him, cannot be paid and satisfied without a sale of the personal property of the deceased, the same, so far as may be necessary for the payment of such debts and legacies, shall be sold. The sale may be public or private, and, except in the city of New York, may be on credit, not

(b) "Wentw. Off. Ex. 141, 14th ed. But see *Jackson v. Bridge*, 12 Mod. 650.

(c) *Baxter v. Burfield*, 1 Bott. P. L. pl. 696, 6th ed.; *S. C.*, 2 Stra. 1266; *Wms.* 690.

(d) 2 Kent Comm. 266.

(e) S. L. 1837, p. 529; 2 R. S. (4th ed.) 261.

(g) 2 R. S. 77; 4th ed. 261.

(h) *Post*, ch. 12.

exceeding one year, with approved security. Such executor or administrator shall not be responsible for any loss happening by such sale, when made in good faith and with ordinary prudence.^(a)

Sec. 26. In making such sales, such articles as are not necessary for the support and subsistence of the family of the deceased, or as are not specifically bequeathed, shall be first sold, and articles so bequeathed shall not be sold until the residue of the personal estate has been applied to the payment of debts.^(b)

The executor or administrator's duty is thus distinctly pointed out; he is not to sell the personal property of the estate, unless he has ascertained that a sale will be necessary to enable him to pay the debts and discharge the legacies. He is then to sell only so much of the property as will be requisite for those purposes; and the 26th section prescribes the order in which certain articles are to be sold, which should be strictly followed. If he discover that a sale will be necessary to pay debts and legacies, it is his duty to sell the personal property; he may do so immediately.^(c)

The reviser's original note to the 25th section is in these words:—"Pursuant to practice, although no express authority; credit is essential to have the property bring near its value;" and to the 26th section, "conformable to law and practice."^(d)

The value of the articles determined by the appraisers will be presumed to be the actual value of such articles; and, if the executor or administrator sell them for less, he may be called upon to show that the sale was fairly conducted, and that the price brought was the highest which could be obtained. If the executor or administrator sell at the appraised value, it is still competent for the parties in interest to show that the articles were of greater value, and that a higher price could have been obtained for the same. The appraised value is only *prima facie* evidence of the value of the property. For these reasons, the safest and most convenient course, is, for the executor or administrator to make the sale by public auction, and, after reasonable public notice, and notice to parties in interest, at least, in the neighborhood.

All sales of the effects of the deceased in the city of New York must be for cash. In the other counties of the state, the credit cannot exceed one year. In case of sales on credit, the executor or administrator must exercise the same prudence with regard to the purchaser to whom credit shall be given, as a discreet and careful person uses in making sales of his own property. He must, besides, demand security from the purchaser for the payment, within as brief a period as may be, not exceeding a year, of the amount of his purchase. The approved security required by the statute, may be the name of some responsible person as guarantor for the payment of the bill, or as endorser of the note of the purchaser for the amount of his purchase. And probably neither good faith, nor any other degree of prudence, will protect an executor or administrator against a loss occasioned by a sale of the

(a) 2 R. S. 87; 4th ed. 272.

(b) 2 R. S. 87; 4th ed. 273.

(c) *Nichols v. Chapman*, 9 Wend. 452, per Savage, C. J.

(d) 3 Revised and other Statutes, (2d ed.,) App. 641.

goods of the estate on credit, if he omit the precaution of insisting upon the security demanded by the statute.

It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate; and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is, that the executor or administrator, in many instances, *must* sell, in order to perform his duty in paying debts, &c.; and no one would deal with an executor or administrator, if liable afterwards to be called to account. The power of the executors to dispose of a chattel specifically bequeathed, seems to have been formerly questioned: but succeeding cases appear to have established it beyond dispute.(g)

And a person proposing to purchase any personal property belonging to the estate, probably need not inquire whether the debts, &c., cannot be paid without a sale, or whether the article be specifically bequeathed; and, if so, whether the residue of the personal property has been before sold. The above quoted sections of the statute are for the government of the executor or administrator; and a purchaser may, it is apprehended, assume that the party with whom he is dealing is acting in the business according to their directions and provisions.

In general, one of two or more executors may make a valid sale of the personal assets of the estate, without the others uniting in the act of transfer. This rule applies as well to notes and other securities given to executors as such, after the death of their testator, as to those given to him in his lifetime, provided the money, when recovered, would be assets.(h)

As an executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required, by a partial sale or mortgage of the assets; and, accordingly, the power of an executor or administrator to mortgage the assets has been recognized by high authorities on several occasions. The mortgage may be either of legal or equitable assets, or of mere choses in action, and may be by actual assignment, or by deposit.(i)

Although the statute does not expressly authorize a pledge of any of the personal property, but only a sale, there can be little doubt, on general principles, that a pledge would be supported where no fraud or collusion appeared in the transaction.

Again, it is not incumbent on the purchaser or mortgagee of the assets to see the money properly applied, although he knew he was dealing with an executor. "It is of great consequence," said Lord Thurlow, in *Scott v. Tyler*,(k) "that no rule should be laid down here

(g) *Wms.* on Exrs. 796, and cases cited; *Knight v. Farborough*, 4 Randolph, 566; *McAlister v. Montgomery*, 3 Haywood, 94.

(h) *Bogert v. Hertell*, 4 Hill, 492.

(i) See *Wms.* 797-8, and cases cited.

(k) "2 Dick. 725."

which may impede executors in their administration, or render their disposition of the testator's effects unsafe or uncertain to a purchaser; his title is complete by sale and delivery: *what becomes of the price is of no concern to him.* This observation applies equally to mortgages or pledges, and even to the present instances where assignable bonds were merely pledged without assignment."^(l)

Exceptions to the general power of the executor or administrator to dispose of the estate of the testator or intestate, will be found in those cases only where *collusion* exists between the purchaser, or mortgagee, and the personal representatives. That an executor may waste the money, is not alone sufficient to invalidate the sale or mortgage; it must further appear that the purchaser or mortgagee participated in the *devastavit* or breach of duty in the executor.^(m)

Fraud and covin will vitiate any transaction, and turn it to a mere color; if, therefore, a man concert with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects, for his own behoof, or in any other manner, contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable to the full value.⁽ⁿ⁾

Thus, where the person to whom the executor collusively passes the property, knows that the executor is acting in violation of his trust, and in fraud of the persons interested in the due administration of the assets, the fraud vitiates the transaction, and the attempt to transfer the property is ineffectual and void.^(o)

The court will follow a note of hand as the property of an estate, if really taken for assets of the estate, sold by the administrator, though the note be taken in the private name of the administrator, and will enforce this by injunction against the private creditors of the administrator.^(p)

Any person receiving from an executor the assets of his testator, knowing that such disposition of them is a violation of the executor's duty, is to be adjudged conniving with the executor to work a *devastavit*, and is accountable to the person injured by such disposition directly, on a bill filed by him. Thus, in *Colt v. Lasnier*,^(q) where the executor, being one of a trading firm, with the knowledge of the firm, mixed the funds of his testator's estate with those of the firm, and they were thus employed in trade; it was held, that the firm were liable for these funds to a legatee of the testator; and this, even admitting that

(l) See Wms. 672. See, also, 2 Story's Eq. Jur., sec. 1124 *et seq.* By the article of the Revised Statutes, "of uses and trusts," (relating to real estate,) sec. 66, 1 R. S. 730; 4th ed. (2d vol.) 141, no person who shall actually and in good faith pay a sum of money to a trustee, which the trustee, as such, is authorized to receive, shall be responsible for the proper application of such money, according to the trust; nor shall any right or title, derived by him from such trustee, in consideration of such payment, be impeached or called in question, in consequence of any misapplication by the trustee of the moneys paid. See *White v. Carpenter*, 2 Paige, 217.

(m) Wms. 799.

(n) Ib.

(o) Ib.

(p) *Glass v. Baxter*, 4 Deane, 153.

(q) 9 Cowen, 320.

the funds had been carried to the account of the executor, and the account as to these closed on the partnership's books.

Whether, in the instance of the executor or administrator aliening the property of the deceased to pay his own debt to the alienee, that circumstance in itself shall be considered conclusive as to the collusion, is a point upon which the decisions of law and equity must, perhaps, be considered at variance. At law, (although it is allowed, that if there be any *conivance* between an executor or administrator and his own creditor, to enable the former to commit a *devastavit*, that fact excepts the case out of the general power of the executor or administrator to dispose of the estate,) it has been laid down that the executor may make a valid sale of the effects in satisfaction of his own private debt, although the purchaser knew the goods sold were the goods of the testator or intestate. But in equity it seems to be now established, (in contradiction, as it should appear to some former cases,) that the executor or administrator can make no valid sale or pledge of the assets as a security for, or in payment of his own debt, on the principle that the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty.^(r)

Where there exists such collusion as to render the dealing invalid, not only a creditor, but a legatee, whether general or specific, is entitled to follow the assets; but they must enforce their right within a reasonable time, or it will be barred by their acquiescence.^(s)

An executor cannot be allowed, either immediately or by means of a trustee, to be the purchaser, from himself, of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased.^(t)

A promissory note or bill of exchange, made payable to the deceased or his order, may be indorsed by his executor or administrator; and, generally speaking, there is no difference between an indorsement of a note by the deceased and one by his personal representative.^(u)

By sec. 3, of the act relative to "voluntary assignments, made pursuant to the application of an insolvent and his creditors,"^(v) executors and administrators may become petitioning creditors for the discharge of an insolvent, under the order of the surrogate to whom they may be liable to account, or of the Chancellor, or any equity judge having jurisdiction; (now of a justice of the Supreme Court having jurisdiction;) and shall be chargeable only for such sum as they shall actually receive on the dividend of the insolvent's estate.

It may also be properly noticed in this place, that it is provided by statute, that, upon the death of any master, to whom any person may

^(r) Wms. 800, and cases cited. See, also, *Sutherland v. Brush*, 7 Johns. Ch. Rep. 21; *Field v. Scheffelin*, Ib. 153.

^(s) Wms. 801, and cases cited.

^(t) Wms. 801, and cases cited; *Van Epps v. Van Epps*, 7 Paige, 237; *Campbell v. Johnston*, 1 Sandf. Ch. Rep. 148; 4 Kent Comm. 438; 4th ed. 475; *Ames v. Downing*, 1 Bradf. Surr. Rep. 321.

^(u) Wms. on Exrs. 806; 1 Parsons on Contracts, 205, and cases cited.

^(v) 2 R. S. 15, 16; 4th ed. 198; S. L. 1847, Vol. I, ch. 280, sec. 16, p. 323.

have been bound to service, as clerk, apprentice or otherwise, by the county superintendents of the poor, or by the overseers of the poor, the executors or administrators of such master may, with the consent of the person bound to service, signified in writing, and acknowledged before a justice of the peace, assign the contract of such service to any other person, which assignment shall vest in such assignee all the rights of the original master, and render him subject to all his obligations.^(w)

If the person so bound to service, refuse to give such consent, such assignment may be made under the sanction of an order of the Court of General Sessions of the Peace, (now the Court of Sessions,) after fourteen days' notice of an application to that effect, served on the apprentice, his parent or guardian, if there be any in the county; and, when so made, such assignment shall be as valid and effectual as if such consent had been given in manner aforesaid.^(x)

Whenever a power is given, if a personal trust and confidence be thereby reposed in the donee, to exercise his own judgment and discretion, he cannot refer the power to the execution of another; for *delegatus non potest delegare*; therefore, where a power of sale is given to executors, they cannot sell by attorney.^(y)

The authority of a special administrator or collector to sell or alienate the personal property of the deceased, is expressly limited by the terms of his appointment.

By sec. 24, of the Law of 1837,^(z) under the direction of the surrogate, he may sell such of the goods of the deceased as shall be deemed necessary for the preservation and benefit of the estate, after the same shall have been appraised.

This provision is a restraint upon the collector's power of sale, and a sale by him of personal property belonging to the estate of the deceased, would not be valid, except in pursuance of its terms. A purchaser of such property from a collector, would not be safe in taking a conveyance, without seeing that the surrogate's direction for the sale had been first obtained.

In order to procure the surrogate's direction for a sale, the collector should present to the surrogate a written application, under oath, setting forth a description of the goods, a sale of which is deemed necessary for the preservation and benefit of the estate, and the cause of such necessity, and praying his direction for a sale. The application is *ex parte*; but the surrogate may, in his discretion, order it to stand over, and require notice to be given to the parties in interest, that they may have an opportunity to be heard before granting its prayer. He may also, of his own motion, demand other evidence besides the oath of the collector, of the necessity of the sale. The direction is given in the form of an order, which must be entered in the surrogate's minutes.

(w) 2 R. S. 160; 4th ed. 344.

(x) Ib. 161; 4th ed. 345.

(y) Wms. 806.

(z) S. L. 1837, 529; 2 R. S. (4th ed.) 261, sec. 39.

CHAPTER X.

FUNERAL CHARGES AND PAYMENT OF DEBTS.

OF THE DUTIES OF THE EXECUTOR OR ADMINISTRATOR IN RESPECT TO THE DISCHARGE OF THE FUNERAL EXPENSES, AND THE PAYMENT OF THE DEBTS OF THE DECEASED; THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR TO SUITS FOR DEBTS OWING BY THE DECEASED; THE LIABILITY OF THE ASSETS TO EXECUTIONS UPON JUDGMENTS AGAINST THE EXECUTOR OR ADMINISTRATOR, AND OF ENFORCING THE PAYMENT OF THE DEBTS BY THE EXECUTOR OR ADMINISTRATOR, BY PROCEEDINGS IN THE SURROGATE'S COURT.

IN treating of this branch of the subject, this work proposes to consider the liability of the executor or administrator for the funeral charges of the deceased, the statutory directions for the payment of the debts of the deceased, and the provisions declaring the liability of the estate, and governing the prosecution and limitation of actions against executors and administrators, as well as those regulating proceedings in the Surrogate's Court to compel payment.

Of the Order of the Payment of the Debts, and herewith of the Funeral.

The following sections of the statutes prescribe the duty of the executor or administrator in respect to the payment of the debts of the deceased, and the order in which such debts are to be paid :—

Sec. 27. Every executor and administrator shall proceed with diligence to pay the debts of the deceased, and shall pay the same according to the following order of classes :—

1. Debts entitled to a preference, under the laws of the United States.

2. Taxes assessed upon the estate of the deceased, previous to his death.

3. Judgments docketed and decrees enrolled against the deceased, according to the priority thereof respectively.

4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.(a)

Sec. 28. No preference shall be given in the payment of any debt over other debts of the same class, except those specified in the third class, nor shall a debt due and payable, be entitled to preference over debts not due ; nor shall the commencement of a suit for the recovery of any debt, or the obtaining a judgment thereon against the executor or administrator, entitle such debt to any preference over others of the same class.(a)

Sec. 29. Debts not due, may be paid by an executor or administrator according to the class to which they may belong, after deducting a rebate of legal interest upon the sum paid for the time unexpired.

Sec. 30. Preference may be given by the surrogate, to rents due or accruing upon leases held by the testator or intestate at the time of his

(a) 2 R. S. 87; 4th ed. 273; secs. 31, 32, 33, 34.

death, over debts of the fourth class, whenever it shall be made to appear, to his satisfaction, that such preference will benefit the estate of such testator or intestate.(aa)

Sec. 7. In all cases in which a record of judgment shall be filed and docketed within one year after the death of the party against whom such judgment was obtained, a suggestion of such death, if it happened before judgment rendered, shall be entered on the record; and if, after judgment rendered, the fact shall be certified on the back of such record by the attorney filing the same. Such judgment shall not bind the real estate which such party shall have had at the time of his death, but shall be considered as a debt to be paid in the usual course of administration.(b)

Sec. 8. If a verdict has been rendered before the death of such party, upon which proceedings shall be stayed by a bill of exceptions, or by any order of the court, or any officer thereof, the court may authorize the filing and docketing a record of judgment within one year after the death of such party, subject to the power of the court to vacate the same.(b)

The statute, it will be observed, does not make provision for any allowance for the funeral expenses of the deceased. The reasonable funeral expenses are, however, to be paid in full, in preference to all other claims against the estate. The payment of the funeral charges may be made by an executor, even before probate; for, as will be remembered,(c) it is expressly excepted from the statute prohibiting an executor from disposing of, or interfering with, the estate of the deceased before letters testamentary are granted. And, on an accounting of an executor or administrator, as will hereafter appear,(d) he is both permitted and required to produce vouchers for all funeral charges.

The executor or administrator must *bury* the deceased in a manner suitable to the estate he leaves behind him.(e) "Funeral expenses," says Lord Coke,(ee) according to the degree and quality of the deceased, are to be allowed of the goods of the deceased before any debt or duty whatsoever. But the executor or administrator is not justified in incurring such as are extravagant, even as it respects legatees or next of kin entitled in distribution.(g) Nor, as against creditors, shall he be warranted in more than are absolutely necessary.(h)

If there be any reason to suspect that the estate will ultimately prove insolvent, then any unnecessary funeral expenses will be at the personal risk of those who authorized it.(i) The rule appears to be, that the executor is entitled to be allowed the reasonable expenses of the funeral, according to the testator's condition in life; and if he exceeds those, he is to take the chance of the estate turning out insolvent. No

(aa) 2 R. S. 87; 4th ed. 273; secs. 31, 32, 33, 34.

(b) 2 R. S. 359, 360; 4th ed. 607; secs. 8, 9.

(c) See *ante*, p. 233; 2 R. S. 71; 4th ed. 257.

(d) See *post*, ch. 12; 2 R. S. 92; 4th ed. 278; sec. 69 (sec. 54.)

(e) 2 Black. Comm. 508.

(ee) 3 Inst. 202.

(g) See *Stackpole v. Stackpole*, 4 Dow. P. C. 227.

(h) See *Shelley's case*, 1 Salk. 296; 4 Burns' E. L. 348, 8th ed.; Comberb. 342; Toll. on Exrs. 245; Wms. on Exrs. (4th ed.) 829; 11 Serg. & Rawle, 204; 14 Ib. 64.

(i) *Hancock v. Podmore*, 1 Barn. & Adol. 260.

precise sum can be fixed to govern executors in all cases. It must obviously vary in every instance, not only with the station in life of each particular testator, but also with the price of the requisite articles at the particular place.⁽ⁱⁱ⁾

As against persons other than creditors, such expenses may be incurred as will bury the deceased according to the station he occupied in life.^(k) In *Wood v. Vandenburg*,^(l) Chancellor Walworth held, that the amount paid for the erection of a suitable headstone at the decedent's grave, may properly be considered as a part of his funeral expenses, in a case where the rights of creditors cannot be defeated thereby.

With respect to the liability of the executor or administrator to the expenses of the funeral of the deceased, it appears to be clear, that if an executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given such orders, he makes himself liable individually, and not in his representative character, for the reasonable expenses. And, notwithstanding that, generally speaking, an administrator is not bound, as such, by his acts done before the letters of administration were obtained, yet it should seem that, if, before taking out letters, he gives orders, or sanctions the orders which another person has given, for the funeral of the deceased, he will be thereby bound, after he has become administrator, to satisfy the charges incurred under such orders.^(m) But in all cases where the executor or administrator has rendered himself personally liable for the funeral expenses to the extent, at least, that they are reasonable they are still a charge against the estate.

Where the executor or administrator has neither given nor adopted any directions for the burial, but he is sought to be charged on an implied contract arising out of his situation, with reference to his character and the estate of the deceased, it seems that, if he has assets, he is liable, upon an implied promise, to either the undertaker or the person giving the order and paying for the funeral, to pay the reasonable expenses of the burial, suitable to the decedent's degree and circumstances;⁽ⁿ⁾ and that the law implies a contract, in such a case, on the part of the executor who has assets *personally*, and not in his *representative character*.^(o)

With respect to debts included in the first of the above order of classes, the laws of Congress provide,^(p) that, where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and further,^(q) that where any

(ii) "*Edwards v. Edwards*, 2 Crompt. & M. 612; S. C., 4 Tyrwh. 438. See, also, *Reeves v. Ward*, 2 Scott, 395;" Wms. on Exrs. 831.

(k) Matthews on Exrs. 69; Wms. on Exrs. (4th ed.) 832, and cases cited; *Appeal of M. Glinsey*, 14 Serg. & Rawl. 64; *Flintham's Appeal*, 11 Serg. & Rawl. 16.

(l) 6 Paige, 277, 285.

(m) Wms. on Exrs. 1522, and cases cited.

(n) See Wms. on Exrs. 1523, 1524, 1525; Matthews on Exrs. 68.

(o) See *Tugwell v. Heyman*, 3 Camp. 298; *Rogers v. Price*, 3 Young & Jerv. 28; *Hayter v. Moat*, 2 Mees. & Wels. 56; Wms. on Exrs. 1523, 1524, 1525.

(p) 2 Laws of U. S. 594, sec. 5.

(q) 3 Laws of U. S. 136, sec. 65.

estate, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any bond or bonds for the payment of duties, shall be first satisfied. And any executor or administrator, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in his own person or estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against him, for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof: Provided, that if the principal in any bond which shall be given to the United States for duties on goods, wares or merchandise, imported, or other penalty, either by himself, or his factor, agent, or other person for him, shall be insolvent; or if such principal, being deceased, his or her estate and effects, which shall come to the hands of his or her executors or administrators, shall be insufficient to pay his or her debts; and if, in either of the said cases, any surety on the said bond or bonds, or the executors or administrators of such surety, shall pay the United States the money due upon said bond or bonds; such surety, his or her executors or administrators shall have and enjoy the like advantage, priority or preference, for the recovery and receipt of the said moneys, out of the estate and effects of such insolvent, or deceased principal, as are reserved and secured to the United States; and shall and may bring and maintain a suit or suits on the said bond or bonds, in law or equity, in his, her or their own name or names, for the moneys paid thereon.

Under these provisions of the acts of Congress, the priority of the United States extends as well to debts by bonds which are payable after the decease of the obligor, as to those actually due or payable at the period thereof.^(r)

Debts by judgment, or decree, by the statute ordered to be paid in the third class, are entitled to preference in payment out of the personal estate of the deceased debtor, according to the priority in point of time of docketing the judgment, or of enrolling the decree; and without reference to any supposed lien of the judgment or decree upon the real estate of the decedent.^(s) That this is so, is evident from the fact, that a prior decree, under the practice previous to the Code, if enrolled, although it was not docketed so as to make it a lien upon real estate, was to be paid in preference to a younger judgment which was docketed, and which might, therefore, be a lien on the decedent's real estate, if he had any, within the jurisdiction of the court. A judgment which had been docketed, or a decree which had been enrolled, more than ten years before the death of the decedent, was, therefore, entitled to be paid out of his personal estate, in preference to a junior judgment or decree which had been obtained within the ten years.

Thus, in *Ainslie v. Radcliff*,^(t) where the decedent died insolvent and

(r) *The United States v. The State Bank of North Carolina*, 6 Peter's Rep. 29.

(s) *Ainslie v. Radcliff*, 7 Paige, 439.

(t) 7 Paige, 439.

intestate, leaving several outstanding and unsatisfied judgments against him, two of which were docketed more than ten years previous to his death, and the others within that period; it was held, that the owners of the judgments were to be paid out of the personal assets of the intestate, in the hands of his administrator, according to the priorities in the times of docketing their respective judgments; without regard to the fact of some of the judgments having been docketed more, and some less, than ten years.

By the common law, one judgment against the decedent had no preference over another judgment, in payment out of his personal estate, provided both were docketed at the time of his death. And his personal representative had the right to retain for a junior judgment due to himself, or to give a preference to one judgment creditor over another, without regard to any priority, in point of time, of the docketing of their several judgments; unless some proceedings had taken place subsequent to the death of the decedent, by which one judgment creditor had obtained a preference over others of the same class, and the preference which the common law gave to judgment debts over debts of specialty, or debts by simple contract, was not founded upon any supposed lien of the judgment upon the real estate of the decedent. For the preference extended to the judgments of all the inferior courts of record in England, and to decrees in Chancery, which were not liens upon real estate.^(tt) But the rule as to preferences in payment was founded upon the common law principle that a specialty debt was a debt of a higher nature than a debt by simple contract, and that a debt of record was of a higher nature than either.^(u)

This provision of the statute does not refer to foreign judgments, nor to judgments recovered in the courts of the other states of the United States. A judgment recovered in another state, has no greater force, in respect to the distribution of the assets of a deceased person, than a foreign judgment. Neither at common law, nor under the statutes of this state, have judgments recovered in another state any title to priority of payment over simple contract debts. Creditors claiming on such judgments, must come in with the creditors of the deceased, described in the fourth class of this section of the statute.^(uu)

It seems that it is a matter of question, whether judgments recovered in the Circuit and District Courts of the United States in this state come within this provision of the statute.^(v) Such judgments are a lien upon the lands of the judgment debtor within the respective districts,^(w) and executions issue thereon with the same effect as on judgments obtained in the courts of this state; and otherwise, generally speaking, they have the same incidents as the latter judgments. It is hazarding little to presume that such judgments recovered in the lifetime of the deceased are entitled, under the statute, to priority of payment.

(tt) Wms. on Exrs. 856, 862.

(u) 1 Paige, 447.

(uu) *Brown v. The Public Administrator*, 2 Bradf. Surr. Rep. 103.

(v) See *Bernes v. Weisser*, 2 Bradf. Surr. Rep. 212.

(w) See *Manhattan Company v. Everton*, 6 Paige, 457.

A judgment against a surety on a stipulation in admiralty, recovered after the death of the stipulator, is not, however, entitled to priority of payment out of his assets. The above provision of the statute authorizing judgments, in certain cases, to be entered against the deceased after his death, and declaring that such judgments shall not bind the real estate, but be considered as debts payable in the usual course of administration, relates to judgments in the courts of this state only.(x)

It should be observed, that the executor or administrator is bound, as far as he has assets, to satisfy all judgments recovered against the testator or intestate, according to the priority thereof respectively, without regard to the circumstance, whether a judgment was founded on a cause of action which would not have survived his death. Thus, although an executor is not liable to be sued for an escape permitted by his testator;(xx) yet, if judgment was recovered for such escape against him in his lifetime, his executor is liable upon the judgment.(y)

By the above section, numbered 30, (2 R. S. 87,) the surrogate may give preference to the payment of rent on leases held by the testator or intestate over debts of the fourth class, upon its appearing to his satisfaction that such preference will benefit the estate. If the deceased owned any leases, and the executor or administrator be of opinion that it will benefit the estate to hold on to them, and doubt the sufficiency of the assets to pay all the debts, he should apply to the surrogate for an order giving preference to the payment of the rents on such leases according to this section. The application should be in writing. It should set forth, to the best of the applicant's knowledge, the situation of the estate of the deceased in respect to its sufficiency for the payment of the debts, the terms and conditions, and the estimated value of the leases, and the necessity which may exist for granting an order for preference, such as the danger of proceedings on the part of the lessor, or whatever else may constitute the immediate cause for the application. The surrogate will doubtless require the application to be under oath, and may deem other evidence necessary before allowing the preference. The proceeding, however, is entirely *ex parte*, as it would be impracticable to give notice of it to every person interested in the estate. If it be made to appear to the satisfaction of the surrogate, that the preference asked for will benefit the estate, an order allowing the same must be entered in the minutes.

The surrogate, upon an accounting by administrators before him, on the application of creditors, is authorized, under this section of the statute, to give a preference to a charge made by the administrators for rent paid on a lease of premises held by the intestate, if it appears to his satisfaction that such preference will benefit the estate.(yy) Rent due from the testator upon a church pew is not, however, a preferred debt under this provision of the statutes, unless it is rent due upon a term of years in such pew, which belongs to the executors or administrators as a part of the personal estate of the testator or intestate.(z)

(x) *Bernes v. Weissner*, 2 Bradf. Surr. Rep. 212.

(xx) See *post*, p. 291.

(y) *Whitacres v. Onsley*, Dyer, 322 a, b.; Wms. 1480.

(yy) *Hovey v. Smith*, 1 Barb. Sup. Ct. Rep. 372.

(z) *Johnson v. Corbett*, 11 Paige, 266.

As to what Claims upon the Deceased survive against the Executor or Administrator, and of the Liability of the Executor or Administrator upon the Acts of the Deceased.

The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other *duty*, that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator.(a) Therefore, it is clear that the executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased, either debts of record, as judgments or recognizances; or debts due on special contract, as for rent or on bonds, covenants and the like, under seal; or debts on simple contract, as notes unsealed, and promises, not in writing, either expressed or implied.(aa)

The Revised Statutes expressly provide that actions of account, and all other actions upon contract, may be maintained against executors in all cases in which the same might have been maintained against their respective testators. And that administrators shall answer and be accountable to others to whom the intestate was holden or bound, in the same manner as executors.(b)

"The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every bond, or covenant, or contract of the deceased includes them, although they are not named in the terms of it:(c) for the executors or administrators of every person are implied in himself.(cc)

"It is clear, also, that in many cases a liability may accrue against the executor or administrator, after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein. Thus, the executor is liable upon a bond which becomes due, or a note payable subsequently to the death of the testator.(d) So, if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this contract."(e)

(a) Touchs. 482; 1 Saund. 216 a, note (1) to *Wheatley v. Lane*. It was said by Willes, C. J., in *Sollers v. Lawrence*, (Willes, 421,) that "actions on the case for all sorts of debts and duties are now daily brought against executors, though this was formerly doubted. But the law has been now so settled at least 150 years."

(aa) "Bac. Abr. Exors. (F.); 1 Com. Dig. Admon. (B. 14.);" Wms. on Exrs. 1464.

(b) 2 R. S. 113; 4th ed. 298, sec. 2, 3.

(c) "Wentw. Off. Ex., ch. 11, p. 239, 243, 14th ed."

(cc) "By Lord Maclesfield in *Hyde v. Skinner*, 2 P. Wms. 197; *Harwood v. Hilliard*, 2 Mod. 265." Wms. 1466.

(d) Toller, 463.

(e) "*Quick v. Ludborough*, 3 Bulstr. 30, by Coke, C. J. In the recent case of *Gordon v. Calvert*, (2 Sim. 253; 4 Russ. Chan. Cas. 581,) A., on taking B. as a clerk, took a bond from him and a surety, to secure his duly accounting for his receipts. No time was fixed for the continuance of the service) but it was to be determinable at the option of either party. The surety died. His executrix gave notice to A. that she should no longer consider herself liable on the bond. A. read the notice to B., and required him to execute a new bond, with another surety, which was done. Then B. died, and deficiencies were found in his accounts, subsequent to the notice. And it was held, that the executrix of the surety had no equity to support an injunction to restrain an action on the bond." Wms. 1466. See, also, *Mactier v. Frith*, 6 Wend. 103.

"The proposition, however, that executors or administrators are liable upon every contract of the deceased, although they be not named, must be understood as not extending to cases where the contract is *personal* to the testator or intestate; for, in such instances, no liability attaches upon the executors or administrators, unless a breach was incurred in the lifetime of the deceased.(e) Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract; for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed.(g) So, a covenant by a master for the instruction of his apprentices is personal to the master, and his executors are not liable upon it.(h)

"With regard to the liability of an executor in respect of the tortious acts of the deceased, it was a principle of the common law, that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed.(i) And at this day, (unless the case falls within the provisions of the statutes, presently to be mentioned,)(ii) where the cause of action is founded upon any *malfeasance* or *misfeasance*, is a tort, or arises *ex delicto*, such as false imprisonment, assault and battery, slander, deceit, and in many other cases of the like kind, where the statement of the cause of action imputes a tort done either to the person or property of another, and the defence must be not guilty, the rule is, *actio personalis moritur cum persona*; and if the person by whom the injury was committed dies, no action of that kind can be brought against his executor or administrator.(k)

"Accordingly, no action lies against an executor or administrator on a penal statute.(l) So if a man, served with a *subpoena*, and having had his expenses tendered to him, neglects to appear as a witness, and dies, no action lies against his executor or administrator.(m)

"Again, if a sheriff, jailer, or keeper of a prison, suffer one in execution for debt or damages to escape, though hereby the party, at whose suit the execution was, be entitled not only to an action upon the case against such officer by the common law, but also to an action of debt by statute,(n) or of trespass on the case, also by statute;(o) yet, if the officer die, no action lies against his executor for the same, because the suffering the escape was a wrong of the nature of a trespass.(p)

(e) "*Hyde v. The Dean of Windsor*, Cro. Eliz. 553. See the remark of Parke, B., in *Siboni v. Kirkman*, 1 Mees. & Wels. 423."

(g) "*Marshall v. Boadhurst*, 1 Tyrwh. 349, by Lord Lyndhurst."

(h) "*Baxter v. Burfield*, Bott. P. L. pl. 696, 6th ed.; *S. C.*, 2 Stra. 1266." Wms. 1467.

(i) "1 Saund. 216 a, note (1) to *Wheatley v. Lane*."

(ii) *Post*, p. 292.

(k) "1 Saund. 216 a, note (1); Wms. 1470."

(l) "*Wentw. Off. Ex.* 255, 14th ed."

(m) "*Wentw. Off. Ex.* 255, 14th ed."

(n) See *St. Westm.* 2; 13 Edw. I, ch. 11; 1 Rich. II, ch. 12; 5 Ann, ch. 9; 1 R. L. 1813, 425, sec. 19; 2 R. S. 437; 4th ed. 681.

(o) 2 R. S. 437; 4th ed. 681.

(p) *Anon.*, Dyer, 271 a; *Whitacres v. Onsley*, Dyer, 322 a; *Perkinson v. Gylford*, Cro. Car. 540; *Bro. Escape*, 28; *Exors.* 100; *Execution*, 86; *Parliament*, 80; *Wentw. Off. Ex.* 254, 14th ed.; *Berwick v. Andrews*, Lord Raym. 973, by Lord Holt; *Hambly v. Trott*, 1 Cowp.

So, where by statute it was provided, that a sheriff who neglected to return a particular warrant, should be liable to pay to the people of the state, to be recovered with costs of suit in an action for so much money received to their use, the whole sum directed to be levied by such warrant.^(g) And the warrant had been delivered to a deputy of the sheriff, and had not been returned; and, after the death of the sheriff, an action of assumpsit was brought against his executors, for a balance of the sum directed to be levied remaining unaccounted; for, it was held, that the action would not lie against the executors of the sheriff for the default of his deputy in returning the process, although the action was given by the statute for the neglect to return; and that, although an action be given by statute in form *ex contractu*, yet, where the cause of action arises *ex delicto*, an action cannot be sustained against the representatives of the party who would have been liable if living, unless the estate of such party was benefited by the act complained of—as where property was tortiously taken and sold, or remains in specie in the hands of the executor or administrator.^(r)

The statutory provisions, which have been adverted to, giving a remedy against the executor or administrator, for wrongs done by the deceased in his lifetime, are as follows:—

Sec. 5. Any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate, who, in his lifetime, shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of any such person.^(s)

Sec. 6. The executors and administrators of every person, who, as executor, either of right or in his own wrong, or as administrator, shall have wasted or converted to his own use, any goods, chattels, or estate of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been, if living.^(t)

Sec. 1. For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrongdoer, and, after his death, against his executors or administrators, in the same manner and with the like effect, in all respects, as actions founded upon contracts.^(u)

Sec. 2. But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the

375; 1 Saund. 216 a, note (1); *Martin v. Bradley*, 1 Caines, 124. See, also, *Franklin v. Low*, 1 Johns. R. 402. But debt lies against the executors of a sheriff, &c., upon a judgment obtained against the testator for an escape.

(g) 2 R. L. 1813, 514, sec. 13. For the corresponding provision of the Revised Statutes, see 1 R. S. 401; 4th ed. 727, 728.

(r) *The People v. Gibbs and another, Executors, &c., of Gibbs, late Sheriff, &c., deceased*, 9 Wend. 29. See, also, *McEvers v. Pitkin, late Sheriff*, 1 Root, 216.

(s) 2 R. S. 114; 4th ed. 299.

(t) *Ib.*

(u) 2 R. S. 447; 4th ed. 690. See *Campbell v. Renwick*, 2 Bradf. Surr. 84.

plaintiff, or to the person of the testator or intestate of any executor or administrator.(v)

Some particular instances, where the executor or administrator is liable with respect to the acts of the deceased, may here be adverted to.

It was the law, previous to the adoption, in this state, of the Code of Procedure, in the case of a joint contract, where several contracted, on the same part, if one of the parties died, his executor or administrator was at law discharged from all liability, and the survivor or survivors alone could be sued.(w) And, if all the parties were dead, the executor of the last survivor was alone liable.(x) But if the contract was several, or joint and several, the executor of the deceased contractor might be sued at law in a separate action:(y) but he could not be sued jointly with the survivor; because one was to be charged *de bonis testatoris*, the other *de bonis propriis*.(z)

With regard to the liability in equity of the deceased joint contractor, it was completely settled that, in the case of a partnership debt, although at law, upon the death of a partner, the remedy against his executors was extinguished, (inasmuch as a partnership contract was joint;) yet they might be sued in equity.(a) But though it had long ceased to be disputed, that if the surviving partner proved to be unable to pay the whole debt, the joint creditor might then obtain full satisfaction in equity from the assets of the deceased partner, yet it was regarded as an unsettled point, whether the creditor had any right to resort to the representatives of the deceased partner, so long as there was a surviving solvent partner, or so long as the insolvency of the surviving partner was not established.

On the one hand, it has been asserted, that the principle on which the creditor is entitled to relief against the assets of the deceased partner, is merely through the medium of the equities subsisting between the partners themselves, and these equities, in respect of creditors, are, that joint debts shall be satisfied out of the joint estate, and that the separate estates of the partners shall not be liable to the demands of the creditors until the insufficiency or insolvency of the joint estate is established. And, therefore, it has been said, the joint creditor must pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner. On the other hand, it is contended, that, in the consideration of a court of equity, a partnership debt is several as well as joint, and

(v) 2 R. S. 448; 4th ed. 690. See reviser's notes, 3 R. & or. St. 2d Appendix, 781. It has already appeared (*Ante*, p. 266; see S. L. 1847, ch. 450, sec. 1; S. L. 1849, ch. 256, sec. 1; 2 R. S. (4th ed.) 561,) that an action may be maintained by the executor or administrator of a deceased person, for his death caused by wrongful act, neglect or default.

(w) "*Godson v. Good*, 2 Marsh. 300, by Gibbs, Ch. J.; *S. C.*, 6 Taunt. 594." Colly on Partn., secs. 576, 723; *Murray v. Mumford*, 6 Cow. 441; *Grant v. Shurter*, 1 Wend. 148; 3 Kent Comm. 63.

(x) *Wms. on Exrs.* 1481; Colly on Partn., sec. 723.

(y) "*May v. Woodward*, 1 Freem. 248;" 1 Chitty, 37; *Engs v. Donnithorne*, 2 Burr. 1190; *Grant v. Shurter*, 1 Wend. 148, 150.

(z) "*Hall v. Iluffam*, 2 Lev. 228; *Wms.* 1482."

(a) "3 Meriv. 619; 4 Mylne & Cr. 109:" 3 Kent Comm. 64; Colly on Partn., book 3, ch. 3, sec. 4.

therefore, that the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner.

Whatever may have been the conflicting opinions upon this important subject, it is now, it seems, in England, established beyond controversy, that, in the consideration of courts of equity, a partnership debt is several as well as joint; and that, upon the death of a partner, the joint creditor has a right in equity to proceed immediately against the representative of the deceased partner for payment out of his separate estate, without reference to the question, whether the joint estate is solvent or insolvent, or to the state of accounts amongst the partners.^(b) And it has been laid down, that this principle extends to every joint contract for a loan of money, giving to the creditor the benefit of the security of several persons, without any distinction, that the debt must be a mercantile debt incurred by joint traders.^(c)

"The true doctrine," it was said, "on the subject of obtaining relief in equity, by considering joint contracts as several, appears to be, that, wherever a court of equity sees that, in a contract joint in form, the real intention of the parties was, that it should be joint and several, it will give effect to such intention. Accordingly, in certain cases, a joint bond has, in equity, been considered as several.^(d) But it is not a rule, that every joint contract shall be considered as several in a court of equity; for a joint contract cannot be extended beyond its legal operation, unless the party seeking so to extend it shows some previous equity entitling him to demand a several contract from each of the joint contractors, or unless there is some ground on which to infer mistake in the nature of the instrument.^(e) In the case of a partnership debt, all the partners have had a benefit from the money advanced, or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured.^(ee) So, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation, and it was not the bond which first created the liability to pay. But where the obligation exists only by virtue of a joint covenant or bond, the extent of its operation can be measured only by the

(b) *Devaynes v. Noble*, 1 Meriv. 530; *S. C.*, on Appeal, 2 Russ. & M. 495; *Sleech's case*, 1 Meriv. 539; *Wilkinson v. Henderson*, 1 M. & K. 582. See, also, *Brown v. Weatherby*, 12 Sim. 6; *Way v. Bassett*, 5 Hare, 68; *Colly on Partn.*, sec. 580, and cases cited; *Story's Eq. Jur.*, sec. 676; *Story on Partn.*, sec. 362; 3 Kent Comm. 64. Justice Williams, in the 4th edition of his learned work on the law of executors, &c., p. 1483, intimates that this still continues to be regarded as an unsettled point in England.

(c) *Thorpe v. Jackson*, 2 Younge & Coll. 533. But see *Slater v. Wheeler*, 9 Sim. 157; *Wms.* 1484.

(d) "*Primrose v. Bromley*, 1 Atk. 90; *Bishop v. Church*, 2 Ves. sen. 100, 371; *Hoare v. Contencin*, 1 Bro. Chan. Cas. 27; *Thomas v. Frazer*, 3 Ves. 399; *Burn v. Burn*, 3 Ves. 573; *Ex parte Kendall*, 17 Ves. 525."

(e) "In case of such a mistake, it seems that equity will relieve as well against a surety as a principal. *Rawstone v. Parr*, 3 Russ. 424, 539."

(ee) "2 Meriv. 37."

words in which it is conceived; and a court of equity cannot give the instrument any other than its legal effect.”(g)

“With respect to the right of a surviving co-contractor to enforce contribution from the personal representatives of his deceased companion,” it was added, “although it cannot be stated as a universal proposition that, in all cases, where two or more jointly employ a third person, there is an implied undertaking in all to contribute ratably *inter se*, so as to bind the executors of a deceased co-contractor; yet, if several persons jointly contract for a chattel, to be made or procured for the common benefit of all—(for instance, the building of a ship or the furnishing of a house)—and as to which the executors of any party, dying before the work is completed, are by agreement to stand in the place of the party dying; in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a contract on the part of the deceased co-contractor, that his executors should contribute his proportion of the price of the article to be furnished.”(h)

The doctrine that, in the case of the death of a partner, resort may primarily be had in equity for a debt due by the firm to the assets of the deceased partner, without alleging and proving the bankruptcy or insolvency of the surviving partner, and without reference to the state of the accounts between the partners, has never been adopted by the courts of this state. On the contrary, in *Lawrence v. The Trustees of the Leake and Watts Orphan House*,(i) a case turning upon this very point, this doctrine was expressly disavowed by the court of last resort, and in direct conflict with the English decisions, which have been referred to, the rule was laid down, that a creditor of a co-partnership, one member of which had died, could not sustain a suit in Chancery, against the personal representatives of the deceased partner, without averring and proving that the surviving members were insolvent. And further, it was held, that, as the remedy at law survived, the creditor was bound to resort to his legal remedy against the surviving debtors, unless he could show a necessity for coming into a court of equity for relief against the estate of the deceased debtor, notwithstanding the recent decisions to the contrary in the English courts. This was on the ground that such debt was joint, and not joint and several. In the case of joint and several debtors the rule was otherwise. And therefore, it was concluded, there never was any right to relief against the executors of the deceased partner, for the recovery of a debt due by the partnership, either at law or in equity, until the occurrence of the insolvency of the surviving member of the firm.(ii)

It remains to consider the state of the law on the subject of the enforcement of partnership contracts after the death of one of the partners, since the changes which have been effected by the adoption of the constitution of 1846, and the subsequent enactment of the Code of

(g) “*Sumner v. Powell*, 2 Meriv. 30; *S. C.*, affirmed, 1 Turn. & R. 423; *Rawstone v. Parr*, 3 Russ. 424, 539.”

(h) “*Prior v. Henbrow*, 8 M. & W. 873.”

(i) 2 Denio, 577.

(ii) See, also, *Slatter v. Carroll*, 2 Sandf. Ch. Rep. 573.

Procedure. By the third section of the sixth article of the constitution, it is provided, that there shall be a Supreme Court, having general jurisdiction in law and equity. The preamble to the Code of Procedure recites, among the reasons for the adoption of that statute, that it is expedient that the distinction between legal and equitable remedies should no longer continue. The sixty-ninth section of the Code declares that the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished. By sec. 118 it is provided, that any person may be made a defendant in an action who has, or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And by sec. 122, the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. Under these provisions of the law, it was held, in *Ricart v. Townsend*,^(k) that, in an action on a contract, made by a co-partnership during its existence, the personal representatives of a deceased partner, may be united as defendants with the surviving partner. The suit was brought against the surviving partner, and the administrators of the deceased partner, for a breach of a contract alleged to have been made by the firm, and the prayer of the complaint was for damages against the defendants \$15,000, besides costs. The defendants demurred, on the ground of a misjoinder of parties, insisting that the action could be brought against the surviving partner only. And Mr. Justice Edmonds, at the special term of the Supreme Court, declared his opinion as follows:—

“Under the old practice, the creditor of a partnership situated as this is, could not have all the remedy to which he might be entitled, without resorting both to proceedings at law and in equity.

“To reach the individual liability of the surviving partner, the resort was to an action at law, as it was, to reach the partnership property, which vested in the surviving partner, and could be reached only through him.

“To reach the liability of the deceased partner, resort must be had to an action in equity, against his representatives, in which the surviving partner might be made a party, because he was interested to keep down the amount of debts, but no decree could be had against him, because the remedy against him was at law.

“This circuity of action and multiplication of remedies grew up gradually and of necessity, to remedy defects in the administration of justice in the courts of law arising from their rules of practice; but there was no good reason for upholding it a moment longer than such necessity existed.

“The first step towards removing that necessity was in the union of the law and equity jurisdiction in the same court by the constitution, and the next was in the remodelling of the practice by the Code. Section 118 of the Code allows any person to be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement

(k) 6 Howard Prac. Rep. 460.

of the questions involved therein. And, under it, when a misjoinder of parties is objected, the inquiry must necessarily be, has the party an interest in the controversy adverse to the plaintiff? or does he claim such an interest? or is he a necessary party to a complete determination of the questions, whatever they are, which are involved in the controversy? If either of these questions are answered in the affirmative, the person is properly made a party. And the question raised by this demurrer must be tested in this manner, and, being so tested, it becomes at once evident that there is no misjoinder of parties.

"If the action is brought to reach the partnership property, the surviving partner is a necessary party, and the representatives of the deceased partner are properly made parties, because they have an interest in the controversy.

"If it is brought to reach the individual liability of the deceased partner, the surviving partner is a proper party, because he is interested to keep down the debts, and might be liable to contribute to the estate of his former partner his share of the debt.

"If it is brought to enforce the liability, both of the partnership property and of the partners individually, then the surviving partner and the representatives of the deceased are necessary parties, and under sec. 122 of the Code, it would seem that the respective rights and liabilities of all the parties may be determined in this action.

"Be that, however, as it may, I see no objection to the joinder of all these parties in this suit, and I see no difficulty in the way of the courts rendering therein the same judgment that would have been rendered in the two suits—one at law and the other in equity—which were necessary under the old practice."(*kk*)

And the demurrer was overruled with costs.

(*kk*) With all deference it is submitted, that the learned justice has not, in this decision, expressed with strict accuracy the principle upon which the liability of the surviving partner and of the personal representatives of the deceased partner, respectively, for the debts of the firm, were regulated by the law of this state, as it stood previously to the adoption of the Code of Procedure. It is erroneous, it is apprehended, to suppose that the rules of law which then prevailed on this subject grew out of any defects in the administration of justice arising from the peculiar distribution of jurisdiction between the courts of law and equity as then constituted. It is true, that the remedy for a debt owing by the partnership was by an action at law against the surviving partner alone, which enabled the plaintiff to reach the partnership property only; and that, after this remedy has been exhausted, in order to reach the separate property of the deceased partner in the hands of his personal representatives, resort must have been had to a court of equity. But this was, it is believed, not because the two jurisdictions were separate, nor because of any merely arbitrary rule, prescribing the respective remedies to be had in the two several courts, but on principle—because the assets of the firm were alone primarily liable for the debts of the firm; and, until the creditor had exhausted his remedy against those assets, there was not any liability on the part of the executor or administrator of the deceased partner. The rule was well established, and—notwithstanding the changes in the law which have been made—it is believed, still remains unaltered, that the right of action for a debt due to the firm survived to the surviving partner, and he succeeded to the exclusive control of the partnership property, and could alone bring actions for the recovery of the debts of the firm. (See *ante*, p. 276.) It was regarded as a strange doctrine, then, that the creditor might, in the first instance, resort to the executor of the deceased partner, who never came to the possession of the partnership funds. If the executor should be held liable to the action, it was considered it would be lawful for him to receive debts and settle partnership accounts, but he had not, as he has not now, any such authority. A payment to an executor of a deceased partner, is no satisfaction to a surviving partner. *Wallace v. Fitzsimmons*, 1 Dallas, 250. And, on these grounds expressly it was held, in *Grant v. Shurter*, (1 Wend. 148,) that the administrators of a de-

It is beyond all question, that the executor or administrator of the deceased partner, is interested in the event of all claims brought against the partnership. It certainly is contrary to his interest, that

ceased partner were not liable in an action on a contract of the partnership. Collyer, in his *Treatise upon the Law of Partnership*, (edition of 1832, p. 342,) lays it down as the result of the authorities, that "upon the death of a partner, the creditor of the firm, unless he holds the joint and several security of the partners, has no immediate claim on the deceased partner's estate, as a separate creditor of that partner; but only a claim through the equities of the partners themselves; which claim may be exercised, in case of the insolvency or insufficiency of the partnership estate." And in *Lawrence v. The Trustees of the Leake and Watts Orphan House*, 2 Denio, 577, this doctrine was expressly approved by the Court of Errors. And Porter, Senator, in his opinion in that case, thus declares:—

"The law authorizes the survivor to retain possession of all the partnership property, and it gives the creditors of the partnership a preference over individual creditors in their right to satisfaction out of such property. Now, to allow these rules to stand, and yet permit the creditor of the partnership to resort to the assets of the deceased partner, and come in for payment out of those assets, *pari passu*, with the individual creditors of the estate, seems to me inconsistent with principle. While the partnership fund is sufficient to satisfy the claims upon it, it is harassing and unjust to those who succeed to the estate of the deceased partner, to permit the creditors of the estate to seek satisfaction out of that estate; and while those creditors enjoy a preference over the creditors of the individual partners, in respect to the partnership fund, they should not be permitted to deprive the individual creditors of their preference in regard to individual property."

The conclusion, then, is believed to be just, that the peculiar mode of obtaining relief for debts due by a partnership, of which one of the members was deceased, under the system which prevailed in this state previous to the Code, had not its origin in any defects in the administration of justice then existing, but was founded upon an established rule of principle and of justice, that primarily the separate estate of the deceased partner was not liable for the debts of the partnership.

The decision under examination, as is intimated in the text, was probably not intended in any way to vary the eventual liability of the personal representatives of the deceased partner, from what it would be according to the rules and authorities which have been quoted. The doctrine that the partnership property should first be applied to the payment of the partnership debts, and that the separate estate of the deceased partner should not be resorted to, for the discharge of the partnership liabilities, until the joint estate had been exhausted, it was doubtless supposed, would govern the final disposition of the case. But in what way a judgment against the surviving partners and the executors of the deceased partners jointly can be made to look into, not only the affairs of the partnership, but the circumstances of the separate estate of the deceased partner, and to determine the respective liabilities of the parties, and the amount applicable to the payment of the debt out of either or both of the funds, is, notwithstanding the 122d section of the Code quoted by the learned justice, not perfectly apparent. One thing, however, is certain, that by the improvement in the law—if improvement it is to be called—the plaintiff saves neither time nor labor. Unless the Code has demolished all the rules which have been stated as governing the liability of the different funds to the payment of debts, where one of the members of a partnership has died, the creditor of the partnership, although he may make the executor or administrator of such deceased partner, jointly with the surviving partner, a defendant in an action for his debt, must still first exhaust the partnership fund, before he can resort to the separate estate of the deceased partner. In this effort, the debt may be collected, and the joinder of the executor or administrator is clearly, then, not of any advantage. If the partnership assets be insufficient for the payment of the debt, the creditor will then, and not until then, be entitled to resort to the executor or administrator for his share of the separate estate of the deceased partner. It is not perceived that the remedy of the creditor is, in the smallest degree, facilitated by the new law or practice. On the contrary, it is apprehended that perplexity and confusion will be the only practical results of the attempt to unite in one action the determination of questions which, in the mature wisdom of courts of law and equity, have always been the subjects of separate judgments. If, however, the decision under examination is to be understood as giving the creditor of the partnership an immediate remedy for his debt against the individual estate of the deceased partner, leaving all questions of the eventual relative liability of the two funds to be settled between the surviving partners and the personal representatives of the deceased partner; then the new rule, directly in conflict as it is with the express authorities upon the subject which have been quoted, will be found, it is apprehended, not to be any improvement upon the previous law, and not only productive of greatly increased litigation in these cases, but in view of the provisions of the statutes pre-

the claimant should recover. If such interest constitutes an interest in the controversy adverse to the plaintiff within the meaning of the language of the Code, the executor or administrator may, without doubt, properly be made a defendant in the action brought for the recovery of the claim. Although he may thus be made a defendant in the action, the estate of the deceased partner in his hands is liable, it is supposed, to answer to the plaintiff for the debt of the partnership only to the extent and in the manner prescribed by the law, as it stood previously to the enactment of the provision in question. The mere permission to make the executor or administrator of the deceased partner a defendant in the action for the recovery of the debt of the partnership, is probably not to be understood as varying the rights or liabilities of the respective parties. The cases of *Grant v. Shurter*,^(l) and *Lawrence v. Trustees of the Leake and Watts Orphan House*,^(ll) already referred to, have definitively settled the law of this state, that the personal representatives of a deceased partner are not primarily liable for the debts of the partnership, but that the surviving partners are alone so liable; and that a creditor of the partnership has not any right to relief against the estate of the deceased partner for the debts of the firm, unless the surviving partner has become insolvent, nor without alleging and proving such insolvency of the surviving partner. And the concluding remarks of the learned justice, above quoted, respecting the enforcement of the liability of the several defendants, doubtless contemplated that the judgment to be recovered in the action, and the remedy to be obtained, whether against the partnership property or the individual estate of the deceased partner, were to be governed by the law prescribing the respective liabilities of the parties as thus settled.

"In every case where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by the death of the testator; ^(m) that is, unless it is such a covenant as was to be performed by the person of the testator."⁽ⁿ⁾

"The executor is not only liable upon all covenants by the testator which have been broken in his lifetime,^(o) but, moreover, he is answerable for all breaches in his own time, as far as he has assets; for the privity of contract of the testator is not determined by his death."^(p)

Thus, damages for breach of a covenant for quiet enjoyment, accruing both before and after the death of the covenantor, it has been held,

scribing the order for the payment of the debts of the deceased, and the mode of compelling such payment, presently to be considered, of no practical utility.

The case of *Voorhies v. Baxter*, (1 Abbott's Prac. Rep. 43,) has come to the notice of the writer while examining the proofs of this chapter. In that case, the Supreme Court at general term, in the first district, held, that the executors of a deceased member of a firm cannot be joined as defendants with the surviving partners in a suit for a debt due from the partnership, and that the creditor has no right of action against the executors of the deceased, until he has shown insolvency of the survivors.

(l) 1 Wend. 148.

(ll) 2 Denio, 577.

(m) "Bro. Covenant, pl. 12; Com. Dig. Covenant, ch. 1."

(n) "*Hyde v. Dean of Windsor*, Cro. Eliz. 553; *Bally v. Wells*, 3 Wils. 29. See, also, *Thursden v. Warthen*, 2 Bulstr. 158; *Macartney v. Blundell*, 2 Ridgw. P. C. 113; Wms. 1487, 488."

(o) "Wentw. Off. Ex. 251, 14th ed."

(p) "*Coghill v. Freelove*, 3 Mod. 326;" Wms. 1488. See, also, F. N. B. 145, (E.) note (a).

may be recovered in one and the same action against his executor or administrator.(pp)

"Again, although a covenant in a lease should be of a nature such as to run with the land, so as to make the assignee of the term liable for a breach of it after the assignment, yet this shall not discharge the executor of the original lessee from a concurrent liability on the covenant, as far as he has assets, even although the lessor shall have accepted the assignee as his tenant.

"Therefore, where the lessee has assigned the term in his lifetime, the lessor may still maintain an action, in the nature of the former action, of covenant against the executor of the lessee, upon an express covenant for payment of rent, even although the lessor has accepted the assignee for his tenant. And so may the assignee of the reversion, by virtue of the stat. 2 R. S., part 2, ch. 1, title 4, taken from 1 R. L. 1813, ch. 31; 32 H. VIII, ch. 34.(q)

"So, if the executor himself assigns the term, the lessor may afterwards bring covenant against the executor, notwithstanding an acceptance of the assignee as tenant. And so also may the assignee of the reversion.(r)

"It must be observed, however, that there is a distinction, with respect to this liability, between an express covenant and a mere covenant in law; for no action lies against an executor or administrator upon a covenant in law, which is not broken till after the death of the testator.(s)

"With respect to the liability of the executor of the lessee to an

(pp) *Hovey v. Newton*, 11 Pickering, 421.

(q) "*Brett v. Cumberland*, Cro. Jac. 521, 522; 1 Saund. 241 a, note (5) to *Thursby v. Plant*. But although the executor of the original lessee will be liable for breaches of covenant, incurred after an assignment by the testator or by himself it is otherwise where the testator was the assignee of the lessee; for no action will lie against him, except in respect of breaches in his own time; and, therefore, all future liability may be discharged by assignment over, even to a pauper. *Taylor v. Shum*, 1 Bos. & Pull. 21. And since such a course is quite justifiable, morally as well as legally, after an offer to surrender the lease to the landlord, the executor may be guilty of a *devastavit* in neglecting to adopt it. *Rowley v. Adams*, 4 M. & Cr. 534." Wms. 1489.

The provisions of the statute are as follows:—

Sec. 17. [Sec. 23.] The grantees of any demised lands, tenements or other hereditaments, or of the reversion thereof, the assignee of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action, or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent or for the doing of any waste, or other cause of forfeiture, as their grantor or lessor had, or might have had, if such reversion had remained in such lessor or grantor.

Sec. 18. [Sec. 24.] The lessees of any lands, their assigns or personal representatives, shall have the same remedy by action or otherwise, against the lessor, his grantees, assignees, or his or their representatives, for the breach of any covenant or agreement in such lease contained, as such lessee might have had against his immediate lessor, except covenants against incumbrances, or relating to the title or possession of the premises demised.

Sec. 19. [Sec. 25.] The provisions of the two last sections shall extend as well to grants or leases in fee, reserving rents, as to leases for life and for years.

(r) "*Hellier v. Casbard*, 1 Sid. 266; *S. C.*, 1 Lev. 127; *Coghill v. Freelove*, 3 Mod. 325. It should seem, that if the lessor proceeds against the executor, and recovers damages for a breach of the covenant after assignment, the executor may have an action on the case against the assignee, for having neglected to perform the covenant, whereby the executor sustained damage. *Burnett v. Lynch*, 5 B. & C. 589."

(s) "*Swan v. Stransham*, Dyer, 257 a; *Bragg v. Wiseman*, 1 Brownl. 22; *Proctor v. Johnson*, 2 Brownl. 214; *Newton v. Osborn*, Style, 387; *Porter v. Sweetnam*, Style, 407; *Netherton v. Jessup*, Holt, 412; *Andrew v. Pearce*, 1 New Rep. 158; Touchst. 160; Com. Dig. Covenant (C. 1). See, also, *Adams v. Gibney*, 6 Bing. 656; Wms. 1489, 1490.

action, in the nature of the former action, of *debt* for rent accrued after the death of the testator, it is fully established, that the executor will be liable as long as the lease continues, and as far as he has assets, as well in the form of an action of *debt* as in covenant, notwithstanding the lessee assigned the term before his death, or the executor has done so since.^(t) But if the lessor has *accepted the assignee as his tenant*, then no action of *debt* will lie against the executor for rent accrued since the assignment, although, as it just appeared, an action in covenant may be maintained on an express covenant for its payment during the continuance of the lease.^(u)

"This may be the proper place to consider the personal responsibility of the executor for the rent incurred under a demise to his testator.

"If the whole rent incurs in the lifetime of the testator, the action to recover it from the executor must be brought against him in his representative character.^(v)

"But in an action, in the nature of the former action, of *debt* for rent incurred after the death of the lessee, *if the executor or administrator enters* upon the demised premises, or, which is the same thing, receives the rents and profits, the lessor has his election, either to sue him as executor or administrator, or to charge him personally as assignee in respect of the perception of the profits.^(w) Therefore, if the action be brought in *debt*, the lessor may either sue the defendant as executor in the *detinet*,^(x) or in the *debet* and *detinet*,^(y) as assignee of the term.^(z) So, in covenant, the lessor has his election, either to charge

(t) "It is true, that Lord Coke, in *Walker's case*, 3 Co. 24 a, says that 'it was adjudged in *Overton v. Sydhall*, that if the executor of a lessee for years assigns over his interest, an action of *debt* does not lie against him for rent due after the assignment; and that, if lessee for years assigns over his interest and dies, the executor shall not be charged for rent due after his death; for, by the death of the lessee, the personal privity of contract as to the action of *debt* in both cases was determined.' But this is contrary to all the subsequent authorities. See *Coghill v. Freelove*, 3 Mod. 325; *Pitcher v. Tovey*, 4 Mod. 76; 1 Saund. 241 b, note (5);" Wms. 1490.

(u) Wms. 1490, 1491.

(v) Wms. 1491; 1 Roll. Abr. 603 (S), pl. 9; *Fruen v. Porter*, 1 Sid. 379.

(w) *Boulton v. Canon*, Freem. 337; *S. C.*, Pollexf. 125; 1 Saund. 1, note (1) to *Jevyns v. Harridge*.

(x) "*Royston v. Cordrye*, Aleyn. 42; *Hope v. Bague*, 3 East, 2"

(y) "*Hargrave's case*, 5 Co. 31; *Rich v. Frank*, Cro. Jac. 238; *Calyn v. Joslyn*, Aleyn. 34; 1 Saund. 1, note 1. So, if the executor enters, he may be charged in the *debet* and *detinet* for the current half-year's rent which commenced before the testator died. *The Bailiffs of Ipswich v. Martin*, Cro. Jac. 411; *Jevens v. Harridge*, 1 Saund. 1. But if one sum of money is due for arrears of rent which *became due* in the lifetime of the testator, and another sum for arrears due in the executor's own time, the lessor cannot in one action charge the executor in the *detinet* for the one part, and in the *debet* and *detinet* for the other; for then two different judgments would be necessary. *Satter v. Codbold*, 3 Lev. 74. But one action may be brought for both sums in the *detinet* only. *Aylmer v. Hide*, 13 Geo. II; B. R. M. S. Selw. N. P. 610, 6th ed. If the lessor in such case will not waive his right of demanding satisfaction out of the estate of the executor, he must bring two actions."

(z) "In such cases, it appears to have been the practice to name the defendant executor, and to state in the declaration, in the *debet* and *detinet*, the demise to the deceased, his death, the grant of administration to the defendant, his entry into the demised premises, and the subsequent accruing of rent. See the entry in *Jevens v. Harridge*, 1 Saund. 1, and the case of *Calyn v. Joslyn*, Aleyn. 34. But it should seem sufficient to charge the defendant in the *debet* and *detinet* as assignee generally, without naming him executor. See *Lyddall v. Dunlapp*, 1 Wils. 4, 5." See, also, *In the Matter of Galloway*, 21 Wend. 32.

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...executor,(a) or as assignee, without naming him executor generally, in stating the cause of action, that the estate of the lessee in the premises lawfully came to the defendant.”(b)

If the executor or administrator have no assets, or the land is, in truth, not worth the sum due, he may show those facts in defence; *prima facie*, however, the land is deemed worth more than the sum demanded.(bb) And being personally liable, the executor or administrator, in a proper case, may be proceeded against by attachment, under the act relative to absconding, concealed and non-resident debtors.(bb)

If the executor or administrator do not enter upon the demised premises, the claim of the lessor comes among the debts of the fourth class prescribed by the statute,(c) and is to be paid in full or *pro rata*, with other specialty or simple contract debts, according to the sufficiency of the assets.

If the executor does not enter,(cc) he is still chargeable, it is said, as executor in the detinet, because he cannot so waive the term as not to be liable for the rent as far as he has assets.(d)

“If the purchaser of a real estate dies, without having paid the purchase money, his heir at law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor or administrator.(e) And if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket, he may afterwards call upon the personal representatives to reimburse him.(ee) So, if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personality so far as it goes. And it has been decided, that if, by reason of the complication of the testator's affairs, the purchase money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet, on the coming in of the assets, the devisee of the estate contracted for, may compel the executor to lay out the purchase money in the purchase of other estates for his benefit.”(g)

Where, however, the balance remaining unpaid on a purchase of

(a) “*Buckley v. Pirk*, 1 Salk. 317.”

(b) “*Tilney v. Norris*, 1 Lord Raym. 553; *S. C.*, 1 Salk. 309; Carth. 519; *Buckley v. Pirk*, 1 Salk. 317; 1 Saund. 1, note (1).”

(bb) *In the Matter of Gallowsay*, 21 Wend. 32.

(c) See *ante*, p. 284.

(cc) “There seems to be some doubt, whether this distinction, as to the entry of the executor, has not, in a great measure, ceased to exist, since the decision of *Williams v. Bosanquet*, 1 Brod. & B. 233. That case decided, (overruling *Eaton v. Jacques*, Dougl. 455,) that the assignee, in fact, of a lease, may be charged as assignee on a covenant contained in it for the payment of rent, though he has never occupied, or actually become possessed. And it does not appear altogether clear, whether it is not a consequence, that an executor may likewise be charged, as assignee in law, without entry. See the observation of Parke, B., at the conclusion of his judgment, in *Nation v. Tozer*, 1 Crompt. M. & R. 176; 4 Tyrwh. 565.”

(d) *Houise v. Webster*, Yelv. 103; *Helier v. Casebert*, 1 Lev. 127. And see Wms. 1493; *Wollaston v. Hakevill*, 3 M. & Gr. 297; *S. C.*, 3 Scott N. R. 593; *Green v. Lord Listowell*, 2 Irish Law Rep. 384; *Ackland v. Pring*, 2 M. & Gr. 937; Wms. on Exrs. 1493, note (b).

(e) *Milner v. Mills*, Mosely, 123; *Broome v. Monck*, 10 Ves. 597.”

(ee) “10 Ves. 614, 615; 1 Sugd. V. & P. 180, 9th ed. See *Lord v. Lord*, 1 Sim. 505.”

(g) “*Whittaker v. Whittaker*. 4 Bro. Chanc. Cas. 31; *Broome v. Monck*, 10 Ves. 597; 1 Sugd. V. & P. 180, 9th ed.;” Wms. 1499.

real estate is secured by a mortgage of such real estate, this rule is probably abrogated by the Revised Statutes. The fifth title of the first chapter of the second part of the Revised Statutes, provides as follows:—

Sec. 4. Whenever any real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.^(h)

This provision applies to cases of absolute intestacy as well as to those cases in which the decedent has disposed of his property, or a part of it, by will.⁽ⁱ⁾

And where, upon the purchase of certain real estate, the testator, as a part of the consideration, assumed the payment of a mortgage already upon the premises, and upon other property, upon a question between the creditor and the executors of the testator, it was held that, under this provision of the statute, the premises included in the mortgage were the primary fund for the satisfaction of the mortgage debt, and that the creditor could not resort to the personal property for the payment of the mortgage debt, until the deficiency, if any, for which the personal estate might be liable, was ascertained by the result of a suit for the foreclosure of the mortgage.⁽ⁱⁱ⁾

But where there is simply a contract for the purchase of land, left incomplete at the death of the decedent, the rule above laid down will prevail, and the personal property will be held liable to complete the purchase for the benefit of the heir or devisee. And upon a contract by the decedent for the purchase of land, where the land has not been conveyed to him, nor the purchase money paid, the land contracted for is, in equity, considered as real estate, and as belonging to the heirs of the decedent. And the unpaid purchase money is primarily chargeable upon his personal estate, and is to be paid by his executors or administrators, for the benefit of such heirs.^(k)

“But if a title cannot be made, or there was not a perfect contract, or the court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal, in consideration of the court, upon which the right of the executor on the one hand, and of the heir or devisee on the other, depends. And, therefore, if the vendor dies, the estate will go to the heir at law of the vendor, in the same manner as if no contract had been entered into;^(l) and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him.^(m) The court cannot speculate upon what the de-

(h) 1 R. S. 749; 4th ed. (2d vol.) 156.

(i) *House v. House*, 10 Paige, 158, 164. See, also, *Johnson v. Corbett*, 11 Paige, 265.

(ii) *Halsey v. Reed*, 9 Paige, 446. See, also, *Mollan v. Griffith*, 3 Paige, 402.

(k) *Johnson v. Corbett*, 11 Paige, 265.

(l) “*Lacon v. Mertins*, 3 Atk. 1; *Attorney-General v. Day*, 1 Ves. sen. 218; *Buckmaster v. Harrop*, 7 Ves. 341. See, also, *Johnson v. Le Gard*, 1 Turn. & Russ. 281.”

(m) “*Green v. Smith*, 1 Atk. 573; *Broome v. Monck*, 10 Ves. 597.”

ceased party would or would not have done; but in these cases the inquiry must be, whether at his death a contract existed by which he was bound, and which he would be compelled to perform. That alone can give to the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor, a right to call upon his heir.(n)

"Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor; and if the executor fails to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator.(o)

"Therefore, if a legacy be of a silver cup or a jewel, and it be in pledge at the testator's death, the legatee has a right to call upon the executor to redeem it, and to deliver it to him.(p)

"There has already been occasion to show, that on the death of the master, the agreement for service on the part of the apprentice is at an end.(q) And it seems equally well established, that the executors of the master are discharged from all agreements and covenants *for the instruction* of the apprentice; for these are considered as personal to the testator, and determined by his death.(r) But the covenant on the part of the master *for maintenance* of the apprentice still continues in force;(s) and, therefore, the executor is liable in an action of covenant, as far as he has assets, if he neglects to maintain him.(t)

"With respect to debts which a wife contracted while single, and which remained due at the time of the marriage, it is clear that the husband is liable, as long as both parties are alive. But this liability which originated in the marriage, ceases with it. And, therefore, upon the death of the husband before the wife, and before payment, the debts survive against her, and executor of the husband is discharged from them.(u)

"Again, if the husband survives the wife, he will not be individually responsible for her debts contracted before marriage, however large a fortune he may have received with her.(v) Nevertheless, as her administrator, he will be liable to answer for them, to the extent of her assets."(w)

If the husband do not administer, however, he is presumed to have

(n) "1 Sugd. V. & P. 189, 9th ed.;" Wms. 1500.

(o) "*Knight v. Davis*, 3 M. & K. 358."

(p) "Swinb., part 7, sec. 20, pl. 18." See, also, *Stewart v. Denton*, 4 Dougl. 219; *S. C.* 2 Chitt. Rep. 456; *Marshall v. Holloway*, 5 Sim. 196; Wms. 1500.

(q) *Ante*, pp. 277, 278.

(r) *R. v. Peck*, 1 Salk. 66; *Baxter v. Burfield*, 1 Bott. P. L. pl. 696, 6th ed.; *S. C.*, 2 Stra. 1266; *Wadsworth v. Guy*, 1 Keb. 820; *S. C.*, 1 Sid. 216. The decision in *Walker v. Hull*, 1 Lev. 177, was *contra*; but the court denied this case in *Baxter v. Burfield*, 2 Stra. 1267."

(s) "*R. v. Peck*, 1 Salk. 66; *S. C.*, *nomine R. v. Pett*, 1 Show. 405; *Baxter v. Burfield*, 1 Bott. P. L. pl. 696, 6th ed.; *S. C.*, 2 Stra. 1266; *Soam v. Bowden*, Finch. Rep. 396."

(t) Wms. on Exrs. 1501.

(u) "*Woodman v. Chapman*, 1 Campb. 189;" *Chapline v. Moore*, 7 Monr. Rep. 175; *Mallory v. Vanderheyden*, 3 Barb. Ch. Rep. 9.

(v) Wentw. Off. Ex. 369, 14th ed.

(w) "*Ibid.* 370; *Heard v. Stanford*, Cas. Temp. Talb. 173; *S. C.*, 3 P. Wms. 409;" Wms 1503.

assets in his hands sufficient to satisfy her debts, and is liable therefor. This is expressly declared by statute,^(x) which further provides that, if the husband shall die, leaving any assets of his wife unadministered, they shall pass to his executors or administrators as part of his personal estate, but shall be liable for the wife's debts to her creditors, in preference to the creditors of the husband.

And the separate estate of the wife, in the hands of her personal representatives, whoever they may be, is liable for the debts which she contracted before her marriage.^(y)

"With respect to debts contracted by a wife after marriage, as far as a supply of necessities, it shall be presumed, as long as he lives, that she had the authority of the husband, as his agent, to procure them for her own use. He may, consequently, be compelled to pay for them, and so may his executors, if he has assets. But the authority will be revoked by the death of the husband; and, therefore, his executor is not liable for necessities supplied to the wife after the decease of the husband, although the fact of his being dead were unknown at the time the necessities were provided.^(z)

"It may be observed that, if a man performs services for the testator, as if a stockbroker transacts all the money concerns of the deceased, without any view to a reward, but in the expectation of a legacy, he cannot set up any demand for such services against the executor or administrator.^(a) Where, however, a surgeon forbore to send in his bill for medicines and attendance to a deceased patient in her lifetime, *under the expectation* of a legacy; and on her death, finding she had left him nothing, he made a claim on her executors; it was held that he was entitled to recover, no proof having been given of any *understanding* between the parties that he was to be paid only by a legacy."^(b)

But where one has served another in expectation of a testamentary provision, and the latter devises to him a portion of his property, he cannot maintain a suit against the executors for compensation for the services rendered.^(c)

"As a court of equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of the testator. Therefore, an act of bounty, which has not been perfected by the testator, is of no avail against his executor.^(d)

"If a man enters into a continuing guaranty and dies, his executor, it seems, is not liable upon it for advances made after the testator's death, which operates as a revocation."^(e)

If, when a bill of exchange becomes due, and is dishonored, the

(x) 2 R. S. 75; 4th ed. 259, sec. 29; recited at length, *ante*, p. 210.

(y) *McKay v. Allen*, 6 Yerg. Rep. 44; *Mullory v. Vanderheyden*, 3 Barb. Ch. Rep. 9, 23.

(z) "*Blades v. Free*, 9 B. & C. 167;" Wms. 1503, 1504.

(a) "*Osborn v. Guy's Hospital*, 2 Stra. 728; *Le Sage v. Coussmaker*, 1 Esp. 188."

(b) "*Baxter v. Gray*, 3 M. & Gr. 771;" Wms. on Exrs. 1504.

(c) *Eaton v. Benton*, 2 Hill, 576.

(d) "*Hooper v. Goodwin*, 1 Swanst. 485; *Cotteen v. Missing*, 1 Madd. 176; *Meek v. Kettlewell*, 1 Phill. Ch. C. 342; *Callaghan v. Callaghan*, 8 Cl. & F. 374; *Searle v. Laws*, 15 Sim. 95; *Dillon v. Coppin*, 4 M. & Cr. 647; *Ward v. Audland*, 8 Beav. 201. An executor may be compelled to execute an agreement by the testator to grant an annuity. *Nield v. Smith*, 14 Ves. 491;" Wms. 1505.

(e) "Smith's Comm. L. 425, 4th edition;" Wms. 1506.

drawer or indorser is dead, notice of the dishonor ought to be given to his personal representative.(ee) Where the drawee, acceptor, or maker, is dead, the bill or note must be presented to his executors or administrators,(f) unless where the bill is made payable and is presented at a particular place, in which case it is not necessary to present it also at the house of the executor or administrator.(ff) In case there is no representative, the holder should demand payment at the house of the deceased.(g) Where a note fell due the 22d of December, and the indorser being absent on a voyage for the recovery of his health, died at sea on the 12th of December, but his death was not known to the holders until March following, and the will was not proved, nor letters testamentary granted until April following, it was held, that notice of the non-payment having been left at the time, at the dwelling-house of the indorser, his last place of residence in New York, and also sent by post to his family, who had shortly before removed into the country, it was sufficient to support an action against the executors of the indorser, without showing any notice to them of the non-payment.(gg)

Of the Liability of an Executor or Administrator on his own Contracts.

It is now proposed to investigate the personal responsibility of an executor or administrator, arising from his own contracts.

A promise by an executor or administrator to pay a debt of the testator, or to answer damages, will not make him personally liable, unless there be a sufficient consideration to support the promise. For a bare promise by the executor does not make him liable out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been had no such promise been made.(h) And by the Statute of Frauds, re-enacted substantially in this state,(hh) the executor or administrator will not be liable, unless the promise is in writing. It is clear, however, that although the promise be in writing, it is of no more effect since the statute, than before, unless it be by deed, or there be a good consideration for it.(i) Hence, since the statute, there are two things necessary for the validity of the promise of the executor or administrator to pay the debt of the testator, or answer damages, out of his own estate. 1st. The common law requires that there should be a sufficient consideration to support the promise; 2d. The statute adds a still further requisite, that the promise should be in writing.(ii) It is,

(ee) Chitty on Bills, 369, 8th ed.; Roscoe on Bills, 199; Byles on Bills, 216, 5th ed. See, also, *Oriental Bank v. Blake, Adm'r*, 22 Pickering, 206.

(f) Roscoe on Bills, 147.

(ff) *Philpott v. Bryant*, 3 Carr. & P. 244.

(g) Roscoe on Bills, 147; Wms. 1714-15.

(gg) *Merchant's Bank v. Birch*, 17 Johns. Rep. 25. See, also, Bayley, 418, Ames' ed.; Roscoe on Bills, note 44.

(h) *Reech v. Kennegal*, 1 Ves. sen. 126."

(hh) See *post*, p. 309.

(i) "The statute has made no alteration in the pleading, and consequently, it does not appear upon the declaration, whether there was a promise in writing or not. It is a matter of evidence only. *Anon.*, 2 Salk. 519; *Williams v. Leper*, 3 Burr. 1890, by Yates, J."

(ii) "*Rann v. Hughes*, 4 Bro. P. C. 27, Toml. ed.; *S. C.*, 7 T. R. 350, note (a); *Hawkes v. Saunders*, Cowp. 289; *Philpot v. Briant*, 4 Bingh. 717; *S. C.*, 1 M. & P. 754. But see *Herrbert v. Powis*, 1 Bro. P. C. 355; Toml. ed."

therefore, expedient to examine, in the first place, what is a valid consideration for a promise by an executor or administrator to charge him *de bonis propriis*; and then to inquire what is a reduction of the promise into writing, sufficient to satisfy the Statute of Frauds.(j)

1st. What is a valid consideration. If a creditor, at the request of an executor, forbears to sue him, that was formerly considered a sufficient consideration to charge him *de bonis propriis*, whether he had assets or not at the time of the promise; and, therefore, it was not necessary to aver in the declaration that he had assets. As if A., to whom the testator was indebted, came to the executor, and said that he intended to sue him for the debt, whereupon the executor promised, in consideration that the plaintiff would forbear him for a reasonable time, to pay him, and A. accordingly forbore to sue him for a reasonable time, that was a good consideration to charge the defendant, in an action upon the case, out of his own estate, without assets; for by this promise it was intended as well to forbear to sue the executor, as to forbear the debt; and a forbearance of a suit, it was held, was a good consideration, without assets, at the time of the promise.(j)

So if an executor was indebted to J. S. in 100*l.*, who demanded the money, the executor was chargeable only in respect of assets, and not otherwise; but if he promised to pay the debt at a future day, it became *his own debt*, and to be satisfied out of *his own estate*.(k) So B. having died indebted to G. for work and labor done, his executors signed the following memorandum on the back of G.'s account: "Mr G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr. G. interest for the same, at 5*l.* per cent., until the same is settled." And it was held, that the executors were personally liable to pay the debt and interest.(kk) Accordingly, in a modern case,(l) two executors gave a promissory note to the plaintiff in the following words, "*As executors to the late T. T., we severally and jointly promise to pay to N. C. the sum of 200*l.*, on demand, with lawful interest for the same:*" And the Court of C. B. held that they were personally liable upon the instrument, upon the ground that the promise, from the circumstance of interest being added, necessarily imported a payment at a future day; and an executor, promising to pay a debt at a future day, makes the debt his own.(m)

(j) See Wms. on Exrs. 1512.

(j) *Johnson v. Whitecott*, 1 Roll. Abr. 24. tit. Action sur Cese (V) pl. 33, upon a demurrer, where the defendant pleaded that he had no assets when the promise was made. It is in said in *Bane's Case*, (9 Co. 94 a.) that if there be no assets, *it shall be given in evidence*: but this opinion has been overruled since. See, also, *Gardener v. Fenner*, 1 Roll. Abr. 15, tit. Action sur Cese, (S) pl. 3; *Chambers v. Leversage*, Cro. Eliz. 644; *Hawes v. Smith*, 2 Lev. 122; *Fish v. Richardson*, Yelv. 55, 56; *S. C.*, Cro. Jac. 47; *Davis v. Reyner*, 2 Lev. 3; *S. C. nomine Davis v. Wright*, 1 Ventr. 120; 2 Keb. 758; *Deeks v. Struth*, 5 T. R. 690. See *infra*, pt. 5, bk. 2, ch. 1. See 2 Saund. 137, c. note to *Barber v. Fox*; *Scott v. Stevens*, 1 Sid. 89. See Wms. on Exrs. 1513-14.

(k) *Goring v. Goring*, Yelv. 11. See *Reech v. Kennegal*, 1 Ves. sen. 126.

(kk) *Bradly v. Heath*, 3 Sim. 543.

(l) *Childs v. Molina*, 2 Brod. & Bing. 460; *S. C.*, 5 Moore, 281.

(m) See, also, *Ridout v. Bristow*, 1 Cr. & J. 231; *Ten Eyck v. Vanderpoel*, 8 Johns. R. 120; *Bowerbank v. Monteiro*, 4 Taunt. 844. Where a bill is indorsed to certain persons as executors, and they again indorse it, they become personally liable: *per* Buller, J., *King v. Thom*, 1 T. R. 489. See Wms. on Exrs. 1516.

In the case of *The Bank of Troy v. Topping*,⁽ⁿ⁾ however, it was held that forbearance as the consideration of a promissory note given by administrators must be affirmatively shown, and that the mere fact that the note was payable at a future day—sixty days after date—would not authorize an inference that forbearance was the consideration, nor be sufficient of itself to charge the administrators personally with the debt. In that case, the intestate, at the time of his death, was indebted to the Bank of Troy on a promissory note made by him, and indorsed by another person, for his accommodation, for \$5,000. When that note fell due, the defendants paid \$1,000, and gave a new note, with the same indorser, payable sixty days after date, for the balance, and signed as follows, "Margaret Topping, *administratrix*; John Holme, *administrator* to the estate of John Topping, deceased." It was on a renewal note of this description that the action was brought, and the court seem to have arrived at the following conclusions: That the promise of an executor or administrator, like every other valid promise, requires a sufficient consideration to support it; that the promise of an executor or administrator to pay the debt of his testator or intestate, in order to bind him personally, must be in writing, and founded upon a good consideration; that assets in the hands of an executor or administrator constitute a sufficient consideration to support the promise; that forbearance to sue is also a good and sufficient consideration, but that such consideration must be shown, and the court could not inter it from the fact that the note was payable sixty days after date. This was upon the ground that a promissory note given in this state, for a simple contract debt, does not absolutely discharge such debt; the creditor may still prosecute upon the original consideration, and may recover upon producing and cancelling the note. In the case under consideration the plaintiffs lost nothing by taking the defendants' notes for the note of their intestate; they might at any time have prosecuted the defendants as administrators for the money lent to their intestate, and recovered judgment, and thus have obtained any preference which the law would then have given them. And with respect to assets as a consideration, as a promissory note *imports a consideration*, and assets constituted a good consideration, the note in question was *prima facie* evidence of assets in the hands of the defendants sufficient to pay it; but that it was competent for them to rebut that presumption, by showing affirmatively that they had no assets, and of course that there was not any consideration to support the note; and that, in such case, the *onus probandi* rests upon the defendant. And as to the evidence to establish a deficiency of assets, the court held that proof of proceedings had before a surrogate, under the statute for the sale of *all the real estate* of the testator or intestate, for the payment of his debts, a sale had in pursuance thereof, and a distribution of the proceeds among the creditors, is not competent evidence to establish the fact that the executor or administrator had *fully administered*, and had no assets belonging to the estate.

It remains to consider 2dly, What is a sufficient reduction into writing of the promise of an executor or administrator. The fourth

(n) 9 Wend. 273; 13 Wend. 557.

section of the Statute of Frauds (29 Car. II, c. 3) enacts, (*inter alia*), "that no action should be brought, whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise to answer for the debt, default, or miscarriage of another person, &c., &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing*, and *signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The statute of this state which, in this particular, substantially follows the fourth section of the Statute of Frauds, enacts as follows:

Sec. 1. No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof be in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized.(o)

The word "agreement" used in this section means the *consideration* of the promise:(p) and, therefore, it was held in the case of *Wain v. Warblers*,(q) that the *consideration* of the promise, as well as the promise itself, must be in writing, otherwise it is void. This doctrine was very much doubted in several subsequent cases, but has been fully established by the more recent decisions.(r) It is, however, sufficient, if the consideration can be gathered from the whole tenor of the writing; and it is not necessary that it should be stated on the face of it in express terms."(s)

With respect to the liability of an executor or administrator, upon a submission to arbitration of a claim upon him as the representative of the deceased, it has been held, that a note given by executors by way of submission to arbitration, is not binding, unless there were assets in their hands. When a submission has been made by *bond*, the executor is liable, not only because a seal imports a consideration,—for a promissory note imports a consideration also—but also because, when a person has executed an instrument under seal, he shall not be permitted to disprove the consideration. Both the bond and note import assets, and of course a sufficient consideration: the consideration of the bond cannot be explained; that of the note may, as between the original parties and all parties having notice of the consideration.(t)

It may properly be suggested, that the principles and rules of law which have thus been stated, with respect to the liability of an executor or administrator on promises to pay the debts of his testator or intestate, have probably not any or but little application under the system

(o) 2 R. S. 113; 4th ed. 298.

(p) "1 Saund. 211, note (2)."

(q) 5 East, 10. See Smith's Leading Cases.

(r) *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Jenkins v. Reynolds*, 3 Brod. & Bingh. 14; *Morley v. Boothby*, 3 Bingh. 107.

(s) "*Stadt v. Lill*, 9 East, 348; *S. C.*, 1 Camp. 242; *Bateman v. Phillips*, 15 East. 227; *Morris v. Stacey*, Holt. N. P. C. 153; *Russell v. Moseley*, 3 Brod. & Bing. 211; *S. C.*, 6 Moore, 521; *Stead v. Liddard*, 1 Bing. 196; *S. C.*, 8 Moore, 2; 1 Saund." 211, note (d); Wms. 1519.

(t) *Ten Eyck v. Vanderpoel*, 8 Johns. Rep. 120; *Shoonmaker v. De Witt*, 17 Id. 304; *Bank of Troy v. Topping*, 9 Wendell, 273. See Wms. on Exrs. 1519 *et seq.*

of administration prescribed by the Revised Statutes and now in force in this State. They grew out of, and were adapted, and were essential to the system of preferential administration which formerly prevailed, and which was superseded by the revision of the laws of 1830. Under that system, if one of several creditors of equal degree sued the executor or administrator, and obtained judgment against him, such creditor must have been satisfied before the rest; and if one creditor of the deceased commenced an action against the executor or administrator, of which he had notice, he was restrained from making a voluntary payment to any other creditor of equal degree.^(u) If, therefore, the executor or administrator having assets, by any promise to or agreement with the creditor delayed his proceedings, and thereby enabled other creditors to obtain a precedence in payment out of the assets, by judgment and execution, the executor or administrator was held to have assumed the debt, and to have become personally liable for its payment; and the Statute of Frauds defined some of the requisites to establish such liability. The Revised Statutes having abolished all preferences, except in favor of debts due the United States, taxes and judgments, and provided for the payment of specialty and simple contract debts, *pro rata*, out of the assets, in case of deficiency the creditor cannot, by any promise or agreement of the executor or administrator, be prejudiced. Neither assets nor forbearance would now, it is presumed, be sufficient to sustain an action on a promise of the executor or administrator, because the plaintiff's share of the assets would be the same either with or without the promise; and as to forbearance, where the claim has once been presented, the creditor's share could not be affected by that, nor would it, as will presently appear, delay the period of payment.

"With respect to the liability of an executor or administrator carrying on the trade of the deceased, the general principle is that a trade is not transmissible, but is put an end to by the death of the trader: Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of a court of equity, they run great risk, even although the will contains a direction that they should continue the business of the deceased.^(v) The case of an executor or administrator, in this respect, is very hard: For, if the trade be beneficial, the profits are applicable to the purposes of the trust, and the executor or administrator derives no personal benefit from the success: If, on the contrary, the trade prove a losing concern, the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death, to the extent of all his own property; also, in his person; and he may be proceeded against as a bankrupt, though he is but a trustee.^(vv) Accordingly, in a case^(w) where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, the Court of K. B. held that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a part-

(u) See Wms. on Exrs. 825, 888.

(v) "*Barker v. Barker*, 1 T. R. 295; *Ex parte Garland*, 10 Ves. 119."

(vv) *Ex parte Garland*, 10 Ves. 119; *Ex parte Richardson*, 1 Buck, 209." See, also, *Case v. Abeel*, 1 Paige, 393; *Alsop v. Mather*, 8 Conn. 584.

(w) "*Wightman v. Townroe*, 1 M. & S. 412. See *Lucy v. Watrend*, 3 Bing. N. C. 841."

nership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves.”(x)

“It must be observed, that when the law speaks of executors not carrying on the business of their testator, it means that they are not to buy and sell: There are many cases, when executors not only may, but are bound to continue the business to a certain extent. Thus if a party contracts for himself and his executors to build a house, and dies, the executors must go on, or they will be liable in damages for not completing the work.(y) So, if a party engages to build a house, and dies after having procured all the necessary materials, it should seem that his executors ought to complete the work, and not dispose of the materials at a loss to the estate.(z) Again, if a bookseller undertakes to publish a work in parts, and, before the completion, he dies, a subscriber has a claim upon the estate to complete the work; for otherwise those parts which he has purchased, upon the faith of the work being completed, are useless: So, if a man makes half a wheelbarrow, or half a pair of shoes, and dies, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state.(a) So, if the deceased died possessed of a manufactory, his executors, it should seem, would be justified in continuing the works for a reasonable time, if this should be requisite for the purpose of selling the machinery and premises to advantage; and they will not, at least in equity, be charged with any loss sustained in employing the assets in so continuing the trade, if they act *bona fide*, and according to the best of their judgment.(b)

Of the Collection of Judgments against the Deceased in his Lifetime; of Suits pending against the Deceased at the Time of his Death; of the Limitation of Actions against Executors and Administrators; of Suits and Judgments against them; of the Publication of Notice for the Presentation of Claims and the Exhibition of Claims against the Deceased to the Executor or Administrator; their Reference and Payment; and of Proceedings in the Surrogates' Courts to enforce the Payment of the Debts against the Personal Property of the Deceased.

1. With respect to the collection of judgments against the deceased in his lifetime, it has already appeared(c) that it is provided by the Revised Statutes, that in all cases in which a record of judgment shall be filed and docketed within one year after the death of the party against whom such judgment was obtained, a suggestion of such death, if it happen before judgment rendered, shall be entered on the record; and if after judgment rendered, the fact shall be certified on the back

(x) Wms. on Exrs. 1528.

(y) *Marshall v. Broadhurst*, 1 Crompt. & Jerv. 405; S. C., 1 Tyrw. 350. *Ante*, p. 290.

(z) 1 Crompt. & Jerv. 405. See, also, *Edwards v. Grace*, 2 Mees. & Wells. 190.

(a) 1 Crompt. & Jerv. 405, 406. See *Dakin v. Cope*, 2 Russ. Chanc. Cas. 170.

(b) *Garrett v. Noble*, 6 Sim. 504; Wms. 1528.

(c) *Ante*, p. 285. See 2 R. S. 359, 60; 4th ed. 607, sec. 8.

of such record, by the attorney filing the same. Such judgment, it is further provided, shall not bind the real estate which such party shall have had at the time of his death, but shall be considered as a debt to be paid in the usual course of administration.(d)

The Revised Statutes further provide as follows:

Sec. 27. If any party die after judgment rendered against him, but before execution issued thereon, the remedy on such judgments shall not be suspended by reason of the non-age of any heir of such party; but no execution shall issue on any such judgment, until the expiration of one year after the death of the party against whom the same was rendered.(e)

Both these provisions may have had special reference to real estate, but they are equally applicable to personal property—the same considerations applying to each species of property.(f) Where the judgment against the defendant was entered on a bond, and warrant of attorney to confess judgment within one year after the death of the defendant, as of the term in which he died, it was held that such judgment did not bind the real estate of the deceased; but that it was merely a debt having a preference, to be paid in the usual course of administration: and that an execution could not issue upon such judgment, nor can an execution issue upon any other judgment where the defendant dies after judgment and before execution, until one year after the death of the defendant.(g)

The following, which is the next section of the statute to that last above recited, relates to the present subject.

Sec. 28. If any person taken in execution against his body, shall die while so charged, new executions may be issued against the goods, chattels, lands and tenements of the deceased, in the same manner as if he had never been charged in execution.(h)

Judgments against the deceased in his lifetime, could, under the Revised Statutes, be revived against his personal representatives by *scire facias*. After providing for the issuing of writs of *scire facias quare executionem non*, whenever an execution had not been issued within the time allowed by law, after the filing of the record of judgment, or recovery by the next section of the statute, it was enacted as follows:

Sec. 2. Writs of *scire facias* shall be issued, in the cases not otherwise provided by law, to revive a judgment against the personal representatives of any deceased defendant, or to continue a suit by or against the representatives of either party who shall have died in the progress thereof. But such writs against the personal representatives of any party, shall be issued within one year after the cause for issuing the same shall arise.(i)

(d) The next section of the statute, as appeared at page 285, provided for the case of a verdict rendered before the death of the party, and proceedings stayed by bill of exceptions or order of the court.

(e) 2 R. S. 368, 4th ed. 616.

(f) *Nichols v. Chapman*, per Savage, Ch. J., 9 Wend. 452, 455.

(g) *Nichols v. Chapman*, 9 Wend. 452. See, also, *The People v. The Judges of the Albany Mayor's Court*, 9 Wendell, 486.

(h) 2 R. S. 368; 4th ed. 616.

(i) 2 R. S. 576; 3d ed. 671. The compilers of the 4th edition of the Revised Statutes have regarded these provisions as repealed by sec. 42^a, ch. 2, tit. 13 of the Code. That section does not, of itself, probably abolish the writ of *scire facias* in any other cases than those for

By section 376 of the Code of Procedure, it is provided that in case of the death of a judgment debtor after judgment, his personal representatives may, at any time within one year after their appointment, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands.

By section 377, the summons is to be subscribed by the judgment creditor, his representatives or attorney; shall describe the judgment, and require the person summoned to show cause within twenty days after the service of the summons; and shall be served in like manner as an original summons.

Sec. 378. The summons shall be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, to his knowledge or information and belief, and shall specify the amount due thereon.

Sec. 379. Upon such summons, the party summoned may answer within the time specified therein, denying the judgment, or setting up any defence which may have arisen subsequently.(j)

Sec. 380. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply, and the issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment, may be compelled by attachment, if necessary.

Sec. 381. The answer and reply shall be verified in the like cases and manner, and be subject to the same rules, as the answer and reply in an action.

These provisions of the Code probably supersede the above second section of the Revised Statutes. The writ of *scire facias*, it should be remarked, however, is not abolished in the case under consideration, by the 428th section of the Code, which applies, it is supposed, only to the cases specified in the chapter of which it is the first section. Nor is the provision of the Revised Statutes repealed by the 468th section of the Code, which declares only, that "all statutory provisions inconsistent with this act are repealed," the proceeding by *scire facias* to revive a judgment against the personal representatives of a deceased debtor, not being inconsistent with any of the provisions of the Code. The subsequent clause of the same section, providing that "all rights of action given or secured by existing laws, may be prosecuted in the manner provided by this act," does not, in terms, prohibit or prevent the issuing of a *scire facias* as a concurrent remedy with that provided by the Code. But a proceeding by *scire facias*, it is laid down, is to be regarded as an action.(k) And the 69th section of the Code provides, that there shall be but one form of action for the enforcement or pro-

which a remedy is substituted by the provisions of the chapter in which it is contained, among which the collection of a judgment after the time for issuing execution has expired, or after the death of the judgment debtor, is not to be found. The provisions of the Revised Statutes for these purposes, are, however, as will presently appear, superseded by other sections of the Code. *Cameron* agt. *Young*, 6 How. Prac. Rep. 372, although this was not so considered in the anonymous case, 1 Code Reporter, 118.

(j) See *Mac Farland v. Irwin*, 8 Johns. 78.

(k) *Cameron & M'Kay* agt. *Young*, 6 Howard's Prac. Rep. 372, and cases cited.

tection of private rights and the redress of private wrongs, which shall be denominated a civil action. And the 127th section provides, that civil actions in courts of record shall be commenced by the service of a summons. An action, therefore, cannot be commenced by *scire facias*, nor otherwise than by the service of a summons. The proceeding by *scire facias* being an action, consequently it is considered as superseded, and the section of the Revised Statutes in question, is by implication repealed.^(l)

The above second section of the Revised Statutes, provided, it will be remembered, that writs of *scire facias* to revive a judgment against the personal representatives of any deceased defendant, should be issued within one year after the cause for issuing the same should arise. "The cause," said Chief Justice Nelson,^(m) speaking of this provision, "is the death of the defendant in the judgment, and that makes the revival by this proceeding necessary. But until the executor qualifies, the plaintiff should not be bound to commence proceedings; the year should then begin to run. The object of this provision is apparent, namely, to enable the executor or administrator to close the settlement of the estate within the eighteen months prescribed by statute;⁽ⁿ⁾ after which time he is bound to render and adjust his accounts before the surrogate. Though the limit of the year is short, I do not perceive any particular hardship in the case: it is desirable the estate should be settled within a reasonable time." This view seems to have been adopted in framing the above sections of the Code, which it will be observed, provide that the personal representatives of the deceased judgment debtor, may be summoned to show cause why the judgment should not be enforced at any time within one year after their appointment.

2. With respect to suits pending against the testator or intestate, at the time of his death, the Code of Procedure, section 121, provides that no action shall abate by the death of a party, if the cause of action survive or continue. In case of death of a party, the court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative in interest.^(o)

It seems that after the death or other disability of a party, the suit cannot be continued by a supplemental complaint, without the leave of the court first obtained; and if a supplemental complaint is served without the leave of the court first obtained, the complaint and the proceedings thereon will be set aside on motion.^(p) The language of the

(l) *Cameron & McKay agt. Young*, 6 Howard's Prac. Rep. 372. But see *Anon.*, 1 Code Reporter, 118.

(m) In *Clark v. Sexton's executors*, 23 Wend. 477-9.

(n) 2 R. S. 92; 4th ed. 277. See *post*, ch. 12.

(o) The corresponding provision of the Revised Statutes, relating to the present subject, was as follows: If any action shall have been commenced within the time prescribed by law for the commencement of such action, and the defendant in such suit die before judgment, and if the right of action be such as survives against the representatives of the defendant, the plaintiff may commence a new action against the heirs, executors or administrators of such defendant, as the case may require, within one year after such death; or if no executors or administrators be appointed within that time, then within one year after letters testamentary or of administration shall have been granted to them. 2 R. S. 298; 3d ed. 396.

(p) Voorhis' Code, 2d ed. p. 97.

provision is, that the court may allow the action to be continued, which implies an application to the court.

3. With respect to the limitation of actions against executors and administrators, the Code of Procedure, section 102, provides as follows:

If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrator, after the expiration of that time, and within one year after the issuing of letters testamentary, or of administration.

The article of the Revised Statutes relative to "suits by and against executors and administrators," provides as follows:

Sec. 8. The term of eighteen months, after the death of any testator or intestate, shall not be deemed any part of the time limited by law for the commencement of actions against his executors or administrators.^(g)

Under this section of the Revised Statutes it was held, previous to the Code, that where the Statute of Limitations had not run against the demand at the time of the death of the debtor, the creditor had eighteen months after such death within which to bring his action, although the limitation of the statute may have expired before the expiration of the eighteen months.^(r) Thus, where the action was upon two promissory notes made by the intestate, and the limitation of six years expired on the 4th September, 1832—the intestate having died on the 10th July, 1832, and the administration of his estate having been issued on the 5th October, 1832—and the action was commenced on the 26th September, 1833, one year and twenty-two days after the statute attached, the Supreme Court determined that the Statute of Limitations was not a bar to the action.^(r)

It is a well settled proposition that no exception to the Statute of Limitations can be claimed unless it is expressly mentioned in such statute.^(s) The exception provided by the above eighth section of the Revised Statutes was eighteen months after the death of the testator or intestate, within which to commence a suit against an executor or administrator for a valid claim existing against the testator or intestate in his lifetime. The statute seems to have proceeded upon the assumption, that in all cases an executor or administrator would be appointed against whom a suit could be brought before the lapse of eighteen months from the decedent's death. Instances, however, are not unfrequent, where a longer period than eighteen months intervenes between the death and the appointment of an executor or administrator. In such cases, where the limitation expired during that period, the statute was a bar to an action, and the claimant was without relief.^(t) This defect

(g) 2 R. S. 448; 4th ed. 690.

(r) *Wenman v. The Mohawk Insurance Company*, 13 Wend. 267.

(s) *Bucklin v. Ford*, 5 Barb. Sup. Ct. Rep. 393; *Reynolds v. Collins*, 3 Hill, 36; *Wenman v. Mohawk Insurance Company*, 13 Wend. 267; *Bacon's Abr.* 395, tit. Lim. of Actions, E. 5, note; Will s. 27.

(t) Some of the remarks of Mr. Justice Nelson, in his opinion in *Wenman v. The Mohawk Insurance Company*, (13 Wend. 268,) would seem to favor the idea that the eighteen months limitation provided by the eighth section of the Revised Statutes, was eighteen months from the granting of the letters testamentary or of administration. He says: "An executor or administrator, after the expiration of eighteen months from the time of his appointment, may be required to render an account of his proceedings, &c.; and he may, after the expiration

in the former law, as it must be supposed it was considered, it was probably the object of the above quoted section of the Code to remedy. The claimant is now allowed one year after the issuing of the letters testamentary or of administration, within which to bring his action. If the provision of the Code is to be understood as superseding the above eighth section of the Revised Statutes, this will, in many cases, abridge the time formerly allowed. As, where the letters are issued, as is common, within a few days or weeks after the death of the testator or intestate. There is not, however, it is plain, anything inconsistent in the provisions of the two sections, and upon their mere language they may very well stand together. By the Code, the action is to be brought within a year after the issuing of the letters, and by the Revised Statutes, the term of eighteen months after the death of the testator or intestate is not to be deemed any part of the time limited for the commencement of the action. This gives in all cases a period of two years and six months after the death of the testator or intestate, within which to bring an action against his executor or administrator, upon a claim not barred by the Statute of Limitations at the time of the death of the decedent.^(u)

It may here properly be observed, that there are cases where the cause of action accrued *after* the death of the testator or intestate, in which it has been repeatedly held, that the statute did not begin to run

of the same time, voluntarily render a final account, and compel attendance of all persons interested." 2 R. S. 92, sec. 52; *Id.* 95, sec. 70. Suits against executors and administrators are greatly discouraged by numerous provisions in the Revised Statutes, as may be seen by reference to various sections. 2 R. S. 88, sec. 31 to 41 inclusive; 9 Wendell, 452. No execution can issue upon a judgment against an executor or administrator, until an account of his administration shall have been rendered and settled, unless by order of the surrogate, sec. 32; and no costs can be recovered against executors or administrators, except in particular cases, sec. 41. Such being the discouraging and fruitless effect of suits in all cases against them, it was just that a delay of eighteen months, which time they have to settle the estate, should not operate to bar the rights of creditors by lapse of time, and for this reason sec. 8 was passed. It is a part of the system established for the regulation of the powers and duties of surrogates, and of executors and administrators in the settlement of estates of deceased persons." The delay of eighteen months which the executor or administrator has for the settlement of the estate and the rendering of his account, it is expressly declared is "from the time of his appointment." See 2 R. S. 92, sec. 52; 4th ed. 277; *Post*, chap. 12. The term of eighteen months allowed for the commencement of actions against executors or administrators, is "after the death of the testator or intestate." There may be a considerable interval between the expiration of the two periods. The preceding portion of the learned justice's opinion very conclusively negatives the notion that on the death of the intestate the running of the statute ceased until administration was granted, and the whole opinion, taken together, may be considered as determining the true construction of this section to be, according to its very words, and that, under its provisions, the limitation prescribed would expire at the end of eighteen months from the time of the death of the testator or intestate, without reference to the time when letters testamentary or of administration may have been granted.

(u) In *Wenman v. The Mohawk Insurance Company*, 13 Wend. 267-9, it was considered by Mr. Justice Nelson, that the above eighth section of the Revised Statutes did not apply to enlarge the time prescribed by sec. 34 2 R. S. 298, for bringing a new action against an executor or administrator, where the decedent died *pendente lite*. (See *Ante*, p. 315 n.) Still less would that section apply to the provision of the Code, sec. 121, corresponding to the 34th section of the Revised Statutes referred to, which, as has appeared above, provides for the continuance of the action pending against the decedent at the time of his death: Nor will it apply to enlarge the time prescribed by the 37th section of the Code already cited, (*ante*, p. —) for taking proceedings to enforce against the personal representatives of the deceased a judgment recovered against him in his lifetime. If the 8th section is still in force, the only case to which it can apply is that provided for by the 102d section of the Code, as above suggested.

until probate, or letters of administration; and this for the plain reason that the cause of action, which must exist before the statute can run, is not complete until there exists a party to sue and be sued.(u) The above eighth section of the Revised Statutes is only applicable to cases where the statute has commenced running before the death of the testator or intestate.(uu)

The Revised Statutes, as will presently appear more at length, provide for a notice to be published by the executor or administrator six months after the granting of his letters, calling upon creditors to exhibit their claims, to be published for six months, and for a reference of disputed claims, presented at the option of the executor or administrator, and exempt the defendant from the payment of costs where a suit is brought on a claim against the deceased not presented, or on one presented and disputed, unless it appear that payment was unreasonably resisted or neglected, or the executor or administrator refused to refer. The same statutes further provide, that where the executor or administrator has thus advertised for claims, and he disputes or rejects a claim presented under the notice, and such claim shall not have been referred, the claimant shall, within six months after such dispute or rejection, if the debt, or any part thereof, be then due, or within six months after some part thereof shall have become due, commence a suit for the recovery thereof, or be forever barred from maintaining any action thereon.(v)

The statute does not, however, prohibit the creditor from suing, and he may do so whether his claim has been presented or not. And if he does present his claim, that will not stop the running of the Statute of Limitations. If the six years have run before the death of the testator, the action is gone. "If the time has not run," it was said in a case(vv) before the Code, "then the creditor has, in the whole, seven years and a half to bring his suit, after the right of action accrued; and he must take care to have the matter adjusted, or commence his action within that period, or he will be too late."

The provisions of the statute thus adverted to will be more particularly examined hereafter, when the subject of the publication of the notice mentioned comes to be considered.(w)

It was regarded as an unsettled point in cases, previous to the Revised Statutes, whether the admission of the personal representatives of the deceased, or of one of several personal representatives, was sufficient to take a demand held against the estate out of the Statute of Limitations.(ww) It was said, also, previous to the Revised Statutes, that an executor is not bound to plead the Statute of Limitations to an action commenced against him by a creditor of the testator.(x) The relations of an execu-

(u) *Wenman v. Mohawk Insurance Company*, 13 Wend. 267-9, per Nelson, J., and cases cited; *Bucklin v. Ford*, 5 Barb. Sup. Ct. Rep. 393-7.

(uu) 5 Barb. Sup. Ct. Rep. 397.

(v) 2 R. S. 88, 89; 4th ed. 274-5.

(vv) *Reynolds v. Collins*, 3 Hill, 37.

(w) *Infra*, p. 323.

(ww) This question is ably and fully discussed, by way of illustration, and the cases are mostly collected in the learned opinion of Mr. Justice Cowen, in *The Cayuga County Bank v. Bennett*, 5 Hill, 238-41.

(x) Toll. on Exra. 343, 429; Kirtland's Surr. 186. Justice Williams thus states the law on this subject: But the executor is not bound to plead the Statute of Limitations to an

tor or administrator to the estate and to the creditors of the deceased, have been so altered by the Revised Statutes from what they were formerly, that it is believed prudent to advise, under the present system, that where the rights of creditors are concerned, an admission of an executor or administrator would not be allowed to take a claim out of the statute, and that, again, as respects creditors, an executor will render himself personally liable, if he omit to set up the Statute of Limitations in a case where that defence may be successfully interposed.

Of the bringing and conducting Suits, the obtaining and enforcing Judgments, and the Prosecution and Collection of Claims generally, against Executors and Administrators; and herewith of the ascertaining the Claims against the Estate by the Publication of a Notice, and the Reference of Claims presented, and the Disposition of Claims referred.

With respect to suits and judgments against executors and administrators, the design and scope of this work will admit only of an examination of the statutory provisions regulating the practice, pleadings and proceedings in such suits, and the manner of enforcing the judgment.

As to the necessary defendants, and their liability to arrest, the statutory provisions are as follows:

Sec. 1. In actions brought by or against executors, it shall not be necessary to join those as parties to whom letters testamentary shall not have been issued, and who have not qualified.(xx)

Sec. 3. No executors or administrators shall be held to bail in any action against them, in their representative character, unless such action be brought to charge them with waste.(y)

Sec. 4. Nor shall they be held to bail in such action, unless upon an order of a judge of the court in which such action shall be brought, founded upon an affidavit of the facts and circumstances to support such charge.(y)

Where there are several defendants, the statute provides as follows:

Sec. 5. In actions against several executors or administrators, they shall all be considered as one person, representing their testator or intestate; and such of them as shall be first served with process, or as

action commenced against him by a creditor of the testator: (*Norton v. Frecker*, 1 Atk. 526. See also Acc. per Lord Lyndhurst, C. B., in *Williamson v. Naylor*, 3 Younge & Coll. 211, note (a). But see *contra* per Bayley, J., in *McCullough v. Davies*, 9 Dowl. & Ry. 43.) Thus if the surplus of the personal estate, after the payment of the debts and legacies, be bequeathed to a residuary legatee, and several creditors, although barred by the Statute of Limitations, commence actions against the executor, equity will not, on his refusal to plead the statute, compel him to plead it in favor of the residuary legatee. (*Castleton v. Fanshaw*, Prec. Chan. 100; *S. C.*, 1 Eq. Cas. Abr. 305; 2 Eq. Cas. Abr. 254, pl. 1, 259, pl. 1; *Ex parte Dewdney*, 15 Ves. 498.) But in *Shewen v. Vandenhurst*, (1 Russ. & M. 347; 2 Russ. & M. 75,) under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time; and the executor refusing to interfere, the plaintiff, a residuary legatee, insisted upon setting up the objection of the statute: Sir John Leach, M. R., held, that it was competent for the plaintiff, or any other person interested in the fund, to take advantage of the statute before the Master, notwithstanding the refusal of the executor: And this decision was confirmed by Lord Brougham on appeal. And Toller (343) is substantially to the same effect.

(xx) S. L. 1838, ch. 149, p. 103; 2 R. S. (3d ed.) 113, sec. 3; 4th. ed. 298, sec. 2.

(y) 2 R. S. 448; 4th ed. 690.

shall first appear in the action, shall answer the plaintiff. Judgment shall be rendered; and in the cases where execution may be issued against the property of the testator or intestate, it shall be awarded against such as shall have appeared, and the others named in the first process, in the same manner as if they had all appeared.

Sec. 6. But no judgment rendered in such action, by default or otherwise, shall be deemed evidence of any admission of assets, in the hands of any executor or administrator who was not served with process in such action, or who did not actually appear therein.

Sec. 7. The preceding section shall not deprive any plaintiff of the usual remedies, to bring into court all the executors or administrators against whom the action is brought.(yy)

Where the power of an executor or administrator is revoked, or he is superseded, or dies whilst a suit is pending against him, the proceedings are regulated by the statute, as follows:

Sec. 15. If an executor or administrator be defendant in a suit, pending at the time of the revocation or superseding of his power as such, the plaintiff in such suit may proceed therein against such executor or administrator, in order to charge him personally; but no judgment recovered therein, after such revocation or superseding, shall be binding, or be of any force as against the estate of the testator or intestate, or any person succeeding to the administration of the same estate.

Sec. 16. If the plaintiff shall not elect so to proceed against such executor or administrator, the court in which such suit may be pending, on the application of the plaintiff therein, and after reasonable notice to the person succeeding to the administration of the same estate, may, by rule of court, substitute the person so succeeding as defendant in such suit, and such suit shall thereafter proceed to final judgment, in like manner as if it had been originally commenced against the person so substituted.

Sec. 17. In case of the death of an executor or administrator during the pendency of a suit against him, the court may, in like manner, substitute the person succeeding to the administration of the same estate, as defendant in such suit, with the like effect.(z)

The following section of the Code of Procedure, although not probably so intended, applies to the cases thus provided for.

Sec. 121. No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action.(zz)

The following sections of the statute relate to the effect of the in-

(yy) 2 R. S. 448; 4th ed. 690.

(z) 2 R. S. 115; 4th ed. 300.

(zz) See *ante*, p. 270.

ventory, when given in evidence in actions against executors or administrators.

SEC. 14. In any action against executors or administrators, in which the fact of their having administered the estate of their testator or intestate, or any part thereof, shall come in issue, and the inventory of the property of the deceased, made and filed by them, shall be given in evidence, the plaintiff or defendant may rebut the same by proof,

1. That any property or effects have been omitted in such inventory, or were not returned therein, at their true value.

2. That such property has perished or been lost, without the fault of such executor or administrator, or that it has been fairly sold by them at private or public sale, at a less price than the value so returned, or that since the return of the inventory, such property has deteriorated or enhanced in value.

SEC. 15. In every such action the defendants shall not be charged for any demands or rights in action specified in their inventory, unless it appear that such demands or rights have been collected, or might have been collected with due diligence.

SEC. 16. The last two sections shall not be construed to vary any rules of evidence, in respect to any proof which an executor or administrator may now make by law.(a)

Where a judgment has been obtained against an heir or devisee, for a debt of the estate, the statute provides as follows:

SEC. 7. Every judgment against an heir or devisee shall be a bar to any subsequent suit against the executor or administrator of the ancestor or devisor, for the same debt or damages, upon which such judgment shall have been obtained, unless the plaintiff shall show an execution against such heir or devisee, returned unsatisfied, or that no sufficient lands or tenement have descended or been devised to such heir or devisee.

SEC. 8. In all cases where a judgment shall be recovered against an heir or devisee, for a debt or legacy expressly charged on the estate descended or devised, it shall be an absolute bar to any subsequent suit against the executor or administrator, for the same debt or legacy.(b)

It may here properly be added, that no justice of the peace has cognizance of an action against an executor or administrator as such.(c) And, in this particular, the jurisdiction of the justices' courts of the different cities of this state, and of the justices' courts and Marine Court of the city of New York, is the same as that of justices of the peace, and is in like manner restricted.(d)

It might properly have been observed, at a previous page, but may here very well be further added, that a judgment against the deceased in a justice's court, not having been docketed in his lifetime, has no priority of payment over other debts.(e)

With respect to the pleadings and proceedings in actions against ex-

(a) 2 R. S. 449; 4th ed. 691.

(b) 2 R. S. 114; 11th ed. 299.

(c) Code, sec. 54.

(d) See Code, pt. 1, tit. 7, chaps. 1, 2, 3.

(e) *Stevenson v. Meisser*, 1 Bradf. Surr. Rep. 343.

ecutors and administrators, it is necessary to consider together the statutory provisions relating particularly to those subjects, and those relating to the recovery of judgments, the issuing of executions, and the compelling accounts in the Surrogates' Courts for the enforcement of judgments and debts of the estate against executors and administrators, and the enforcement of debts of the estate against executors and administrators, by proceedings in the Surrogates' Courts generally. The ascertainment of the debts of the deceased by the publication of a notice for the exhibition of claims, the reference of claims, and the disposition of claims referred, being proceedings for the payment of debts, and the reference being in the nature of a suit, and being so joined in the statutes, will properly be also considered in the present connection. This subdivision will, therefore, embrace not only the subjects of pleadings and proceedings in suits against executors and administrators, but nearly all the remaining topics proposed to be treated of in this chapter.

The following sections of the statute prescribe the regulations to be observed in the prosecution of suits against executors and administrators, and declare the conditions under which executions are to be issued against them.

Sec. 31. In any suit against an executor or administrator, the defendant may show, under a notice for that purpose given with his plea, that there are debts of a prior class unsatisfied, or that there are unpaid debts of the same class with that on which the suit is brought; and judgment shall be rendered only for such part of the assets in his hands as shall remain after satisfying the debts of the prior class, and as shall be a just proportion to the other debts of the same class with that on which the suit is brought. But the plaintiff may, as in other cases, take judgment for the whole or part of his debt, to be levied of future assets.(f)

Sec. 32. No execution shall issue upon a judgment against an executor or administrator, until an account of his administration shall have been rendered and settled, or unless on an order of the surrogate who appointed him. And, if an account has been rendered to the surrogate by such executor or administrator, execution shall issue only for the sum that shall have appeared, on the settlement of such account, to have been a just proportion of the assets applicable to the judgment.(f)

Sec. 20. [Sec. 19.] Where a creditor shall have obtained a judgment against any executor or administrator, after a trial at law upon the merits, he may, at any time thereafter, apply to the surrogate having jurisdiction, for an order against such executor or administrator, to show cause why an execution on such judgment should not be issued.(g)

Sec. 21. [Sec. 20.] The surrogate to whom such application may be made, shall issue a citation, requiring the executor or administrator complained of, at a certain time and place therein to be named, to appear and account before him; and if, upon such accounting, it shall appear that there are assets in the hands of such executor or administrator, properly applicable under the provisions of this chapter,(gg) to

(f) 2 R. S. 88; 4th ed. 273-4.

(g) 2 R. S. 116; 4th ed. 301.

(gg) Chap. 6, pt. 2, R. S.

the payment, in whole or in part of the judgment so obtained, the surrogate shall make an order that execution be issued for the amount so applicable.^(g)

Sec. 22. [Sec. 21.] Every such order shall be conclusive evidence that there are sufficient assets in the hands of such executor or administrator, to satisfy the amount for which the execution is directed to be levied; and no appeal shall be made from any such order, unless the person making the same shall execute to the plaintiff in such execution, a bond with sufficient sureties, to be approved of by the surrogate, conditioned for the payment of the full amount so directed to be levied, with interest thereon, and the costs of defending the appeal, in case the order appealed from shall be affirmed.^(g)

Sec. 23. [Sec. 22.] If the whole sum for which a judgment may have been obtained shall not be collected on the execution so directed to be issued, and assets shall thereafter come into the hands of such executor or administrator, the surrogate shall make a further order for issuing execution, upon the application of the creditor, his personal representatives or assignees, and shall proceed in the same manner, from time to time, whenever assets shall come to the hands of the executor or administrator, until such judgment shall be satisfied.^(h)

The following section of the statute, relative to "pleadings and set-offs," provides for judgments for set-offs in suits brought by executors and administrators, and regulates the issuing of executions on such judgments.

Sec. 38. [Sec. 24.] Whenever a set-off is established in a suit brought by executors or administrators, the judgment shall be against them in their representative character, and shall be evidence of a debt established, to be paid in the course of administration; but execution shall not issue thereon, until directed by the surrogate who granted letters testamentary or of administration.⁽ⁱ⁾

The following section of the same statute relates to the subject of set-offs in actions against executors and administrators.

Sec. 39. [Sec. 25.] In actions against executors and administrators, and against trustees and others, sued in their representative character, the defendants may set off demands belonging to their testator or intestates, or those whom they represent, in the same manner as the person so represented would have been entitled to set off the same, in an action against them.^(j)

The ruling principle of the statute relative to the payment of the debts of deceased persons, is, in case of an insufficiency of assets, to effect a *pro rata* distribution among all the creditors of the deceased not expressly preferred.

The 27th section of the statute declaring the order for the payment of the debts of the deceased, already recited at length,^(k) provides, as will be remembered, that the executor or administrator shall pay the same according to the following order of classes:

(g) 2 R. S. 116; 4th ed. 301.

(h) 2 R. S. 117; 4th ed. 301.

(i) 2 R. S. 355; 4th ed. 605.

(j) 2 R. S. 355; 4th ed. 605.

(k) *Ante*, p. 284, 285.

1. Debts entitled to a preference, under the laws of the United States.

2. Taxes assessed upon the estate of the deceased, previous to his death.

3. Judgments docketed and decrees enrolled against the deceased, according to the priority thereof respectively.

4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.

The 28th section, also already recited, it will likewise be remembered, forbids any preference in the payment of any debt, over other debts of the same class, except those specified in the third class. It follows, from these provisions, that all debts not included in the first three classes of section 27, are to be paid ratably, in case of deficiency of assets, and without any preferences, excepting such preference as is allowed by the section numbered 30, before recited,^(l) in respect to rents due or accruing upon leases; such being the principle of the statute,^{4t} it became necessary that means should be provided for enabling the executor or administrator to ascertain all the debts existing against the estate, in order that he might determine as to the sufficiency of the assets, and, in case of deficiency, to how much each claimant was entitled. The publication of a notice for the presentation of claims, was the expedient devised for this purpose, and such publication is provided for by the following sections of the statute. The same sections also prescribe regulations in respect to vouchers, and for the reference and enforcement of claims against the estate.

Sec. 34. Any executor or administrator, at any time, at least six months after the granting of the letters testamentary or of administration, may insert a notice once in each week for six months, in a newspaper printed in the county, and in so many other newspapers as the surrogate may deem most likely to give notice to the creditors of the deceased, requiring all persons having claims against the deceased to exhibit the same, with the vouchers thereof; to such executor or administrator, at the place of his residence or transaction of business, to be specified in such notice, at or before the day therein named, which shall be at least six months from the day of the first publication of such notice.^(m)

Sec. 35. Upon any claim being presented against the estate of any deceased person, the executor or administrator may require satisfactory vouchers in support thereof, and also the affidavit of the claimant that such claim is justly due, that no payments have been made thereon, and that there are no off-sets against the same to the knowledge of the claimant; which oath may be taken before any justice of the peace, or other officer authorized to administer oaths.^(m)

Sec. 36. If the executor or administrator doubt the justice of any claim so presented, he may enter into an agreement in writing with the claimant, to refer the matter in controversy to three disinterested persons, to be approved by the surrogate; and upon filing such agreement and approval of the surrogate in the office of a clerk of the Supreme

(l) *Ante*, p. 284.

(m) 2 R. S. 88; 4th ed. 274.

Court, or of the clerk of the Court of Common Pleas of the county in which the parties, or either of them, reside, a rule shall be entered by such clerk, either in vacation or in term, referring the matter in controversy to the persons so selected.^(m)

Sec. 37. The referees shall thereupon proceed to hear and determine the matter, and make their report thereon, to the court in which the rule for their appointment shall have been entered. The same proceedings shall be had in all respects, the referees shall have the same powers, be entitled to the same compensation, and subject to the same control, as if the reference had been made in an action in which such court might by law direct a reference; and the court may set aside the report of the referees, or appoint others in their places, and may confirm such report, and adjudge costs, as in actions against executors; and the judgment of the court thereupon shall be valid and effectual in all respects as if the same had been rendered in a suit commenced by the ordinary process.⁽ⁿ⁾

The following section provides for the case of a claim exhibited to the executor or administrator, and disputed or rejected by him.

Sec. 38. If a claim against the estate of any deceased person be exhibited to the executor or administrator, and be disputed or rejected by him, and the same shall not have been referred, the claimant shall, within six months after such dispute or rejection, if the debt, or any part thereof, be then due, or within six months after some part thereof shall have become due, commence a suit for the recovery thereof, or be forever barred from maintaining any action thereon; and no action shall be maintained thereon, after the said period, by any other person deriving title thereto from such claimant; and any executor or administrator may, on the trial of any action founded upon such demand, give in evidence, in bar thereof, under a notice annexed to the general issue, the facts of such refusal and neglect to commence a suit.^(o)

The following sections of the statute contain provisions governing the prosecution of claims not presented under the notice authorized by the preceding 34th section, and regulate the recovery of costs in suits against executors and administrators.

Sec. 39. In case any suit shall be brought upon a claim which shall not have been presented to the executor or administrator of a deceased person, within six months from the first publication of such notice, as hereinbefore directed, such executor or administrator shall not be chargeable for any assets or moneys that he may have paid, in satisfaction of any claims of an inferior degree, or of any legacies, or in making distribution to the next of kin, before such suit was commenced, but may prove such notice published by him as aforesaid, and such payment and distribution, in support of his plea of having administered the estate of the deceased.^(o)

Sec. 40. In such action the plaintiff shall be entitled to recover only to the amount of such assets as shall have been in the hands of such executor or administrator at the time of the commencement of the suit; or he may take judgment for the amount of his claim, or any part

^(m) 2 R. S. 88; 4th ed. 274.

⁽ⁿ⁾ 2 R. S. 89; 4th ed. 274.

^(o) 2 R. S. 89; 4th ed. 275.

thereof, to be levied and collected of assets which shall thereafter come into the hands of such executor or administrator.(o)

Sec. 41. In such suit no costs shall be recovered against the defendants; nor shall any costs be recovered, in any suit at law, against any executors or administrators, to be levied of their property, or of the property of the deceased, unless it appear that the demand on which the action was founded was presented within the time aforesaid, and that its payment was unreasonably resisted or neglected, or that the defendant refused to refer the same, pursuant to the preceding provisions; in which cases the court may direct such costs to be levied of the property of the defendants, or of the deceased, as shall be just, having reference to the facts that appeared on the trial. If the action be brought in the Supreme Court, such facts shall be certified by the judge before whom the trial shall have been had.(p)

Sec. 42. But any creditor who may have neglected to present his claims as aforesaid, may, notwithstanding, recover the same in the manner prescribed by law of the next of kin and legatees of the deceased, to whom any assets shall have been paid or distributed.(q)

The enforcement of claims against executors and administrators, by proceedings in the Surrogates' Courts, is provided for as follows:

By section 18 of the title of the Revised Statutes concerning "the rights and liabilities of executors and administrators,"(r) the surrogate having jurisdiction has power to decree the payment of debts against the executor or administrator of a deceased person, upon the application of a creditor. The payment of any debt, or a proportional part thereof, may be so decreed at any time after six months shall have elapsed from the granting of the letters testamentary or of administration.

By the article of the Revised Statutes concerning "the duties of executors and administrators in rendering an account, and in making distribution to the next of kin,"(s) an executor or administrator, after the expiration of eighteen months from the time of his appointment, may be required to render an account of his proceedings, by an order of the surrogate, to be granted upon application from some person having a demand against the personal estate of the deceased, either as creditor, legatee, or next of kin; or of some person in behalf of any minor having such claim; or without such application; or the executor or administrator may voluntarily render such account, and be decreed to pay and distribute any part of the estate remaining in his hands to and among the creditors and other persons interested, according to their respective rights.

By section 76 of the law of 1837,(t) the order to account thus authorized, must be served upon the executor or administrator thirty days

(o) 2 R. S. 89; 4th ed. 275.

(p) 2 R. S. 90; 4th ed. 275.

(q) Ib. For the statutory provisions relative to the recovery from next of kin and legatees, of debts due by the deceased, see art. 2, title 3, chap. 8, part 3 of the Revised Statutes, 2d vol. p. 450; 4th ed. 692. See, also, on the same subject, *Stuart v. Kissam*, 2 Barb. Sup. Ct. Rep. 493, 512.

(r) 2 R. S. 116; 4th ed. 300.

(s) Art. 3, title 3, chap. 6, part 2, 2 R. S. 92; 4th ed. 277.

(t) S. L. 1837, 537; 2 R. S. (4th ed.) 277.

at least before the time of hearing ; or, where the executor or administrator resides out of this state, must be published for three months in the state paper, and in a paper of the county or of an adjoining county, unless it be served upon such non-resident executor or administrator, at least sixty days before the return day thereof.

The statutory declarations and provisions relating to the subject now under examination, have been collected in this chapter, as well because it is believed that the connected form in which they are thus given will be found generally useful to the reader, and prove conducive to the proper discussion and understanding of the present subject, as to facilitate the necessary references to them in the following pages. It will also serve, it is hoped, to exhibit more distinctly the harmonious relation which exists in their respective enactments, touching the liability of the estates of deceased persons, and the prosecution of claims and actions against executors and administrators.

In the course of the following remarks, several of the decisions which have been made respecting the construction and operation of some of these sections will be cited at considerable length. This plan has been adopted, and has been the more freely pursued, not only for the sake of accuracy, but because it will be found that those decisions, in many instances, besides determining the particular points directly in issue in the cause, embody important directions and principles to be regarded by the executor or administrator in the due discharge of the duties of his trust.

The defence of a want of assets by an executor or administrator in an action at law against him, which appears to be authorized by the above section, numbered 31, and also by the section numbered 39, and the pleas generally, which, under the Revised Statutes, may be successfully interposed by executors and administrators in suits against them, are made the subject of comment in several reported decisions, to which it is proper in this place to direct the reader's attention.

Although the forms of pleading in vogue under the Revised Statutes have been abolished by the Code of Procedure,^(u) and a system of complaint, answer and reply, adopted in their stead, the general principles and substantial rules of pleading remain unaltered, and these cases are as applicable under the new system as under that previously existing.

In *Parker's Executors v. Gainer's Administrators*,^(v) it was held that a plea by an administrator of a judgment recovered against him as administrator, and that he has fully administered, except as to goods and chattels to a certain amount, which are not sufficient to satisfy such judgment, is not a bar to a recovery, and the court say :

"The plea is clearly bad, the judgment gave no preference to Gainer (the judgment creditor) over the claim of the plaintiffs.^(w) Under our present system of administration, preferred debts are but few in number. Debts entitled to preference under the laws of the United States, taxes and judgments against the deceased at the time of his death, constitute the 1st, 2d and 3d classes ; all judgments against his personal

(u) Code of Procedure, part 2, title 6.

(v) 17 Wend. 559.

(w) "2 R. S. 86, sec. 28 ;" *Ante*, p. 284.

representatives, and recognizances, bonds, sealed instruments, and demands on simple contract against the deceased, come in for equal dignity.(x) As to all these, after the debtor's decease, no preference can be created by the acts of the parties, nor in any other way, except as to rents, in respect to which a preference may be given at the discretion of the surrogate. Id. 28 and 30. To the surrogate the whole administration is committed, in so far that no execution can, in general, go upon a judgment obtained after the death, except on a full accounting before the surrogate on an order made by him. The common law courts are reduced to little more than mere instruments of liquidation.(y) Ample provision is made for proceeding to a general account and payment of judgments, obtained after the death of the testator or intestate, and of the bonds, &c., of the deceased, as claims of the same degree, and in dividends *pro rata*.(z) The plea adopted here, would have been good at common law, had our statute stopped with bringing bonds and contracts to the same level, for, in respect to debts of equal degree, the first judgment must have been first satisfied.(a) The doctrine is very familiar, and it constitutes the sole foundation of the plea, the form of which may be found in 3 Chit. Pl. 947-8, ed. of 1828. The sole principle of the plea used to be, that by recovering a judgment, assets *pro tanto* became tied up in the hands of the defendant, and, as it were, appropriated by law to the payment of the judgment; and if there were no assets beyond, the defendant might be said, in one sense, to have fully administered. The statute destroying the principle, this plea of course falls to the ground. As well might the administrator have pleaded a simple contract with *riens ultra*, as now to plead this judgment. The old system of preferential administration being almost entirely subverted, all the pleadings and other parts of the ancient superstructure, in so far as it was raised for the protection of that system, have gone with it.

"The thirty-first section allows a defence, on notice with the plea, adapted to the present order of preference and *pro rata* distribution, though it is very difficult to perceive how a common law verdict and judgment can be made to look into the concerns of the whole estate, and fix the exact rate of recovery. The provision seems to me to be of little if any practical benefit; for, looking at the various powers of the surrogate,(b) execution must, in all cases which I have been able to conceive, go upon his order, not only in the first instance, but for assets *quando acciderint*. However formal, full and specific the verdict and judgment may be under section 31, in respect to present or future assets, I cannot see, when I look at the plain and broad words giving power to the surrogate, that they may be received to conclude, or in any way control him in marshalling assets. Were this not so, a verdict at law between A and B might exhaust the estate, and leave the great mass of creditors without any satisfaction for their debts. At all

(x) "2 R. S. 87, secs. 27, 28;" *Ante*, p. 284.

(y) Id. 88, sec. 32; 9 Wendell, 448, 486; 2 R. S. 116, sec. 19. See *ante*, p. 321.

(z) Id. 88, sec. 34 *et seq.*; Id. 116, sec. 19 *et seq.*; *Ante*, p. 321.

(a) 2 Wms. EXRS. 679, 680, and the cases there cited; 4th ed. 855, 868.

(b) 2 R. S. 87-8, secs. 30, 32, and Id. 116, secs. 19 to 22 inclusive; *Ante*, p. 321-2.

events, it is safe to say that any other mode of pleading, founded on notions of preference, besides that given by the 31st section, is gone. That declares that the defendant may give notice with his plea, whatever it is, that there are debts of a prior class, or unpaid debts of the same class; and judgment is to go only for the assets *ultra* or *pro rata*, and the plaintiff may take judgment also for assets in *futuro*; and no matter of defence arising under the above section numbered 39, prescribing the administrator's defence in the case of a claim not presented under his notice, could be received under a plea framed pursuant to the 31st section."

The doubt thus intimated, whether the above 31st section could, in practice, be made available, is repeated in the remarks of the court in the subsequent case of *Butler v. Hempstead's Administrators*.^(c) After reviewing the statutory directions relative to the payment of the debts, Chief Justice Nelson there says:—

"These several provisions most effectually abolish all preferences in the payment of debts, except in respect to those of a higher degree, together with judgments and decrees existing against the deceased, and secure a *pro rata* distribution where the assets are insufficient to satisfy all the debts. The general principle is not only declared by forbidding preferences in the payment, but power is given to the executor and to the surrogate to accomplish the object of the statute.^(d) The suit may be defended to prevent an absolute judgment beyond the just proportion; but even then, an execution cannot issue till the estate has been settled, so as to enable the surrogate to ascertain what that proportion will be; or upon the order of this officer. It seems the judgment is not to be conclusive as to the proportion; indeed, it must be in most cases impracticable to ascertain it till the settlement of the estate; nor do we discover any particular use in the 31st section. For an execution cannot issue upon a judgment against executors or administrators in any case, until an account of their administration has been rendered, or on an order from the surrogate; and then only for the just proportion of the assets. Whether the suit, therefore, is defended or not, is immaterial; for, in either case, no more than the just proportion of the debt can be legally collected, if there is a deficit of assets. A judgment gives no preference.^(e)

Afterwards, in *Allen and Wife v. Bishop's Executors*,^(f) this 31st section was almost in terms declared nugatory. That case was a demurrer to two pleas on the part of the executors, one of which was the plea of *plene administravit*. Chief Justice Nelson, in delivering the opinion of the court, says:—

"There are some sections of the Revised Statutes, which it is impossible to reconcile with the general system prescribed in respect to the settlement of estates of deceased persons. The system itself does not seem to have been fully comprehended by its authors. A *pro rata distribution* among the creditors of a class, in case of deficit in the assets,

(c) 18 Wend. 666.

(d) 2 R. S. 88, secs. 31, 32; *Ante*, p. 321.

(e) "2 R. S. 87, sec. 28;" *Ante*, p. 284.

(f) 25 Wend. 414.

is a fundamental principle, for the enforcement of which abundant provision has been made. The whole fund is brought under the control of the *surrogate*, and not a dollar can be touched without his assent. Executors and administrators are but trustees to settle the estate under his direction and control, agreeably to the principles of the statute. Nothing is gained by obtaining a judgment against them beyond the liquidation of the debt. The creditor gets no costs, except at the discretion of the court, and only his *pro rata* share on the judgment. The result is the same, whether the suit be defended or not.^(g)

"The plea of *plene administravit*, therefore, seems altogether inappropriate and useless. It has already been held, in the case last above cited, that the plea of *plene administravit proeter* is no longer a bar, notwithstanding,^(h) which imports the contrary; and I think we are bound to say the one in question is not a bar, though the 39th section seems to indicate otherwise. That and the next section pre-suppose that the creditor may subject the executor where he had paid debts of an inferior degree in certain cases; but it is apparent, from other provisions, as well as the general scope of the statute, no such liability can arise by force of the judgment; it may by force of the order of the surrogate, on a settlement of the accounts.⁽ⁱ⁾ There he will be held to account in conformity with the rules prescribed by the statutes, according to the priority and equality of the respective classes,^(k) unless the creditor has forfeited his right by laches.^(l)

"The act is positive, that no execution shall issue until an account and settlement takes place, or on the order of the surrogate; and then only for the plaintiff's *proportion of the assets* thus ascertained.^(m) However absolute may be the judgment, I do not see how it can control this officer in marshalling assets or settling the estate; and the litigation in a suit at law of any questions that may be involved in that duty, seems worse than idle."^(mm)

The note of the revisers to the section in question does, not offer such an explanation of its provisions as to render it practically available. It is as follows: "By the existing law, the commencement of a suit gives a preference to the claim so prosecuted over others of the same class. But this may be defeated by the confession of a judgment to another creditor, thus giving to an executor the power of selecting his favorite creditor, who is to be paid at the expense of all the others! The injustice of this power is palpable. It was probably sanctioned in order to prevent one creditor from grasping all the estate by his vigilance. The better remedy would seem to be, to destroy the preference given to claims prosecuted, and thus the temptation to multiply costs would be removed, while the reason for giving to executors the right of preferring creditors by a judgment would cease. The principle of these sections is admitted by the existing law, which allows an

(g) "18 Wend. 666; 12 Id. 542; 17 Id. 559."

(h) 2 R. S. 88, sec. 31; *Ante*, p. 321.

(i) 2 R. S. 92, 95.

(k) 2 R. S. 87, secs. 27, 30; *Ante*, p. 284, 321-2.

(l) 2 R. S. 89, secs. 38, 39.

(m) "2 R. S. 88, sec. 32, p. 116; sec. 18, 23; 12 Wend. 512.

(mm) 17 Wend. 561.

executor to confess a judgment for the benefit of all the creditors, and thus destroy preferences."⁽ⁿ⁾

There is a difficulty in proceeding under the section in question, which was not adverted to by the learned court in the decisions which have been quoted. An executor or administrator is liable to suits for debts owing by his testator or intestate; which, by the other provisions of the statutes, are to be paid in full, or ratably, according to the sufficiency of the assets and the total amount of the debts; at any time after his appointment; but, by the succeeding section, numbered 34, providing for the publication, by the executor or administrator, of a notice to all persons having claims, for the purpose of ascertaining the whole amount of debts to which the assets in his hands shall be liable, he cannot discover all the claims against him until the expiration of a year from the granting of his letters. He consequently does not know until the year has elapsed, whether the assets will be sufficient to pay all the debts in full or not. In suits then against him, in the meantime, especially for debts included in the 4th class of the 27th section, it will be absolutely impossible to ascertain the proportion of the assets to which any claimant may be entitled, so that judgment may be rendered for exactly the proper amount under the section. And other difficulties would present themselves in attempting a defence according to this provision; but enough has been said to show that it is unavailable in practice, if not absolutely nugatory.

In an action against an administrator, the plaintiff cannot join a count on a promise by the intestate, with counts on promises by the administrator for causes of action accruing since the death of the intestate. A promise by the administrator, on an account stated of moneys due from the intestate in his lifetime, may be joined with a count on a promise by the intestate, but not a promise by the administrator on an account stated of moneys due from himself.^(o)

In an action against a married woman, executrix, the husband must be joined as a defendant. And they must both plead; otherwise it will be a discontinuance. If a *feme covert* and a stranger are executors, the action must be against the stranger, executor, and the husband and wife, executrix.^(p)

With respect to the defendant's pleas in proceedings by *scire facias*, against executors or administrators, it was held, in *Dox v. Backenstose, Administratrix &c.*,^(q) that it is a good plea to a declaration, on a *scire facias quare executionem non*, issued against an administratrix upon a judgment against her, that she has not rendered an account of her administration to the surrogate.

"The Revised Statutes," says Chief Justice Savage in that case, "have materially altered the law and the practice in relation to executors and administrators. Formerly, it was often important to obtain a judgment as early as possible against an executor or administrator; for the first judgment was entitled to priority in payment. But now,

(n) 3. R. & or. S. App. 641-2.

(o) *Gillett v. Hutchinson's Admr's*, 24 Wend. 184; *Reynolds v. Reynolds' Admr's, &c.*, 3 Ib. 244.

(p) Wms. on Exrs. 1647, and cases cited.

(q) 12 Wen. 542.

neither the commencement of a suit, nor the obtaining a judgment against an executor or administrator, entitles such debt to a preference over others of the same class.^(r)

"The jurisdiction of the surrogate has been extended and enlarged in relation to this class of persons. Executors and administrators themselves have a new character, and stand in a different relation from what they formerly did, to the creditors of the deceased persons with whose estates they are entrusted. They are not now the mere representatives of their testator or intestate—they are constituted trustees; and the property in their hands is a fund, to be disposed of in the best manner for the benefit of the creditors, and not liable, as it once was, to be dissipated in bills of costs, created by the anxiety of creditors to obtain the first judgment, and thus secure the payment of their debts, to the prejudice, perhaps, of others. Now a more equitable rule prevails. No preference is given among debts of the same class."

And after stating that the above section, numbered 32,^(s) prohibiting the issuing of an execution upon a judgment against an executor or administrator until an account of his administration shall have been rendered and settled, or unless on an order of the surrogate who appointed him, is positive, the learned chief justice proceeds: "Until the statute has been complied with, the plaintiff is not in a situation to issue an execution. The defendant here is called on to show cause why execution should not issue. She does show cause; and that cause is, that until the plaintiff calls her into another court, and gives her an opportunity to show, before the appropriate tribunal, the true state of the fund in her hands, he is not in a situation to ask this court for an execution upon the judgment. If eighteen months have expired since her appointment, the plaintiff may obtain an order from the surrogate requiring her to render an account of her proceedings. On the rendering of such account, the surrogate is invested with equitable powers. The statutory provisions on this subject are ample; to the surrogate the plaintiff must resort, and there have the matter examined, and the amount, if any due him, liquidated, and an order obtained, specifying the amount for which execution may issue. All this is good cause for the plaintiff to show why this court ought not to award an execution before an accounting in the Surrogate's Court.

"Whether the former practice of proceeding by *scire facias*, to issue execution against executors and administrators has not been superseded by the statute transferring to the surrogate authority to order the issuing of an execution, is a question not now necessary to be decided; but if it is not, it seems to me the intention of the Legislature may be frustrated. I doubt very much whether this court would be justified in looking into the equities, which are properly inquirable into before the surrogate; if it would not, it is evident that the whole subject is under the supervision and control of the surrogate. I see no good reason for preventing a plaintiff, who has the surrogate's order, from instituting proceedings in this court; but on this point no definite opinion is given. It is enough that, until the order is obtained, no execution can issue."

(r) "2 R. S. 87, sec. 28; *Ante*, p. 284.

(s) 2 R. S. 88; 4th ed. 274; *Ante*, p. 321.

But to a *scire facias quare executionem non* issued against executors to revive a judgment against the testator, a plea that the executors have not accounted to the surrogate is not good; and so it was held in *Clark v. Saxton's executors*.⁽ⁱ⁾ And the court say that "in *Dox v. Backenstose, Administratrix*, a judgment had been rendered against the administratrix, and the *sci. fa.* issued to obtain execution, after the year. The plea was sustained, because by the statute^(u) no execution could issue on a judgment against an executor or administrator, until an account of administration had been taken and settled, or by order of the surrogate; and a pretty strong intimation was given that it might be issued by such order without any revival. But here the judgment is *against the testator*, and the object of the proceeding is to charge the executors on that judgment. The case is not within the statute, nor does it come within it until the judgment of revival is entered. After that, being a judgment against the executors, it may stand on the footing of *Dox v. Backenstose*. I am inclined to think the intimation in that case, that the order of the surrogate is sufficient to authorize the issuing of the execution, without a revival, should be adopted. That officer, as there remarked, possesses ample power to adjust any defence that may exist against the judgment: indeed, the reason given for refusing the writ of *sci. fa.* is, that under the act, the estate must first be settled, so as to ascertain the amount for which execution may issue: after this the proceeding would be the merest form. This view, if sound, affords an additional consideration for the proceeding here, for until judgment of revival is obtained against the executors, the surrogate has no control over the execution."

The writ of *scire facias*, having been in substance and effect abolished, by the Code of Procedure,^(uu) there is not now any proceeding similar to that formerly provided by *scire facias quare executionem non*, against an administrator upon a judgment against him. The Code prohibits an action upon a judgment between the same parties, without leave of the court, for good cause shown, on notice to the adverse party.^(v) In case of an application for leave to bring a new action upon the judgment, the defence set up in the plea, in *Dox v. Backenstose, Administratrix, &c.*, that the defendant had not rendered and settled the accounts of the administration, would probably be admitted to prevent the leave of the court being given.

With respect to the enforcement against an executor or administrator of judgments against the deceased in his lifetime, it is provided by the Code, as will be remembered,^(w) that in case of the death of a judgment debtor, after judgment, his personal representatives may be summoned at any time within one year after their appointment, to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands; that upon such summons, the party summoned may answer, denying the judgment, or setting up any defence which may have arisen subsequently, and that a judgment

(i) 23 Wen. 477.

(u) 2 R. S. 88, sec. 32; *Ante*, p. 321.

(uu) See *Ante*, p. 273; *Cameron & McKay v. Young*, 6 Howard's Practice Reports, 372.

(v) Code, sec. 71.

(w) See *Ante*, p. 313; Code, sec. 376 to 382.

may be given in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment, may be compelled by attachment if necessary. The construction of these provisions of the Code, so far as relates to executors and administrators, is, without doubt, to be ascertained by reference to the law as it stood, previous to their adoption. They were enacted, it may be presumed, to supply the place of the former proceedings by *scire facias*, to revive a judgment against personal representatives, which at the same time was superseded. Under that proceeding, an execution, as has just appeared, could not be issued upon the revived judgment against the executor or administrator, until an account of his administration had been rendered and settled before the surrogate. Under the new provisions, therefore, although they speak of enforcing the judgment by execution, &c., yet the issuing of such execution, it is reasonable to suppose, would be regulated by the court by the provisions of the Revised Statutes, which have been referred to, and in accordance with the cases cited, would not be allowed until an account of the administration of the executor or administrator had been rendered and settled.(x)

With respect to the defence of the Statute of Limitations, the eighth section of the act relative to suits by and against executors and administrators,(y) provides, it will be remembered, that the term of eighteen months, after the death of any testator or intestate, shall not be deemed any part of the time limited by law for the commencement of actions against his executors or administrators. Under the system of pleading previous to the Code, where a testator was indebted, and died within six years after the accruing of a cause of action against him, and within eighteen months after his death a suit was brought against his executor, who pleaded the Statute of Limitations; the proper course for the plaintiff was, to reply that the cause of action did accrue within six years, and not to plead the facts specially that the cause of action accrued within six years before the death of the testator, and that the suit was commenced within eighteen months after that period. On such general replication, in the computation of time, the eighteen months were excluded.(z)

Where the time intermediate the cause of action accrued, and the commencement of the suit, was seven years and six months, or more, the defendant, it was determined, should plead the common plea.(a) And if the plaintiff meant to contest the time, he should reply that the cause of action did accrue within the six years. The statute, section 8,

(x) It should be noted, that the sections of the Code referred to, provide for cases of judgments against joint debtors, where one of the defendants has not been served with the summons, and for the enforcement of judgments against deceased judgment debtors, against their heirs, devisees or legatees, or the tenants of their real property, as well as to the enforcement of judgments against deceased judgment debtors, against their personal representatives: and it is submitted that the provision authorizing the issuing of the execution or attachment, may well be understood as having its full and literal application only in some of the former and not in the latter cases, leaving the latter to be governed by the existing rules prescribed by the Revised Statutes for the issuing of executions against executors and administrators.

(y) 2 R. S. 448; 4th ed. 690; *Ante* p. 315.

(z) *Howell v. Babcock's Executor*, 24 Wend. 488.

(a) " *Vid. Huntington v. Brinckerhoff*, 10 Wend. 278; 283-4."

above quoted, then came in and directed the mode of computation. It declares that the eighteen months shall not be deemed a part of the six years pleaded; in other words, the six years were not complete, in the special case, unless the whole time was seven years and a half. "The statute," it was said, "is one of evidence or computation. It is not like the statute creating an exception in cases of infancy or coverture, &c." These exceptions, it is admitted, must be replied, as was done in *Chandler v. Vilett*.^(b) A direct issue on the time, keeping the disability out of view, would admit evidence of time only. The disability, or cause of exception, could not appear upon the record without being specially replied. So where the defendant is beyond sea.^(c) But in an action against an executor or administrator, a possible case for the statute appears on the face of the declaration. The bar is still one of six years, but it is that time exclusive of eighteen months. "This shall not," says the statute, "be deemed a part of the time limited." In order to satisfy the plea in such a case, the party must make out six years intermediate the day when the cause of action accrued and the day when the suit was commenced, beside the eighteen months running immediately after the death of the debtor. That is the time intended by the words of the plea, six years, &c., and in such a particular case.^(d)

The Code, as amended in 1852, in prescribing the contents of the defendant's answer, provides, section 149, for "A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition." By section 153, when the answer contains new matter constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defence to such new matter in the answer; or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof; and the plaintiff may demur to one or more of several counter-claims set up in the answer, and reply to the residue.

A defence of the Statute of Limitations, whether founded upon the above quoted eighth section of the Revised Statutes, or upon the clause of the 102d section of the Code before recited,^(e) providing, that where the statute has not run previous to the death, a new action may be commenced after the expiration of the statute, within one year after the issuing of the letters, will come within the description of "new matter," provided for in the answer by the 149th section. A reply, however, to new matter, is permitted only in case such new matter constitutes a counter-claim, which the defence of the Statute of Limitations probably is not. An issue upon the Statute of Limitations, although that may be the principal issue to be tried, will not, therefore,

(b) "2 Saund. 117, c. 120."

(c) "Vid. 10 Wend. 284."

(d) *Howell v. Babcock's Executor*, 24 Wend. 488-90. See, also, *Benjamin v. De Groot*, 1 Denio, 151.

(e) *Anle*, p. 315.

under the new system, appear upon the record. The 168th section of the Code, however, provides that the allegation of new matter in the answer, not relating to a counter-claim, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require.^(f)

With respect to the defendants' set-offs, in suits brought by executors or administrators, the 24th section of the statute relative to pleadings and set-offs, as was seen in a previous chapter,^(g) provides that in such suits demands existing against their testators or intestates, and belonging to the defendant at the time of their deaths, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased. By the above 24th section of the same statute,^(gg) whenever a set-off is established in a suit brought by executors or administrators, the judgment shall be against them in their representative character, and shall be evidence of a debt established to be paid in the course of administration. The language of this latter provision extends to all suits brought by executors in which a set-off is established, including suits which might also have been instituted in the name of the executor personally. The rule, however, is well established, as was stated in a previous chapter,^(h) that in a suit by an executor or administrator, upon a cause of action which arose after the death of the testator or intestate, the defendant cannot set off a demand against the testator or intestate, even though it existed at the time of his death.^(hh) The reason given is, that as the law existed previous to the Revised Statutes, a defendant, by such a set-off, might compel the payment of a simple contract debt in preference to a judgment or bond debt. And since the Revised Statutes, such a set-off might, if the estate should prove insolvent, prevent a *pro rata* distribution. Such would be its effect where a suit is brought by an executor, as such, to recover money received by the defendant since the death of his testator and belonging to his estate. If, in such case, the defendant is at liberty to set off a debt due him from the testator at the time of his death, he might succeed in obtaining payment of all his demand, when there were not sufficient assets to pay all the creditors. The consequence would be the same if a defendant were allowed to set off his claim against the estate, in a suit brought against him to recover money belonging to the estate, loaned to him by the executor. The 23d section of the statute above referred to, in its terms seems to be broad enough to admit a set off in all suits brought by executors and administrators; but the construction which has been given to it by the courts is now too well settled to be questioned, and is clearly necessary,

(f) The following section of the Code, which is inconsistent with this provision, and was probably overlooked in enacting the amendments, is of course to be deemed repealed.

Sec. 154. If the answer contain a statement of new matter constituting a defence, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and if the case require it, a writ of inquiry of damages may be issued.

(g) Chap. 8, *ante*, p. 274.

(gg) *Ante*, p. 274-5.

(h) Chap. 8, *ante*, p.

(hh) *Dole v. Cook*, 4 John. Ch. Rep. 13; *Root v. Taylor*, 20 John. 13; *Fry v. Evans*, 8 Wend. 530; *Mercein v. Smith*, 8 Wend. 210; *Ante*, p. 275.

as well since as before the Revised Statutes, to give effect to the policy of the law in regard to the distribution of estates.

Thus, where the executor sued in his representative character on a promissory note made to him, describing him as executor for a debt due to the testator in his lifetime, and by his notice, subjoined to his declaration, made the note in question his only cause of action; it was held that the plaintiff had a right to object to the allowance of a set-off of a claim against the testator in his lifetime, on the ground that the cause of action, in the form given to it by the consent of parties, arose after the death of the testator.(i)

The result of the statute and of the cases would seem to be, that, in an action by an executor or administrator for a cause of action which arose previous to the death of the decedent, the defendant may set off a demand existing against the decedent and belonging to the defendant at the time of the death of the decedent. By the 24th section of the statute, if a balance be found due to the defendant, the judgment for such balance will come in among other debts to be paid *pro rata* in case of a deficiency. But if the action be for a cause of action which arose after the death of the testator or intestate, a set-off of a claim existing against him at the time of his death will not be allowed. The executor or administrator will be entitled to judgment for the whole of his demand, and the demand of the defendant will be a debt against the estate, to be paid in full or *pro rata*, according to the sufficiency of the assets. In the first case, the balance due by the decedent at the time of his death is the debt against the estate, to be paid along with the other debts and in the same proportion. In the second, the debt owing by the deceased is the debt to be paid in the same manner, but the defendant is required to pay the demand which he owes to the executor or administrator.

With respect to set-offs in actions against executors and administrators, it may be remarked that an administrator who has purchased a judgment against a plaintiff, since the rendition of a judgment against him for a debt owing by the intestate, will not be allowed by the court, in the exercise of its equitable powers, to set off such judgment.(j)

Of enforcing a Judgment obtained against an Executor or Administrator after a Trial at Law upon the Merits.

The above section, numbered 32,(k) prohibits the issuing of an execution upon a judgment against an executor or administrator, until an account of his administration shall have been rendered and settled, or unless on an order of the surrogate who appointed him. It further provides, that if an account has been rendered to the surrogate by such executor or administrator, execution shall issue only for the sum that shall have appeared, on the settlement of such account, to have been a just proportion of the assets applicable to such judgment.(kk) By the

(i) *Merrill v. Seaman*, 6 Barb. Sup. Ct. Rep. 330.

(j) *Hill's v. Tallman's Administrator*, 21 Wend. 674.

(k) 2 R. S. 88; 4th ed. p. 274; *Ante*, p. 321.

(kk) This provision of the Revised Statutes is still operative. See Code, sec. 471; *Ohmstead agt. Vredenburg and another*, 10 How. Prac. Rep. 217, *per Harris, J.*

above section, numbered 20, [sec. 19,](*l*) a creditor, who shall have obtained a judgment against an executor or administrator, after a trial at law upon the merits, may at any time thereafter apply to the surrogate having jurisdiction, for an order against such executor or administrator, to show cause why an execution on such judgment should not be issued. The judgment creditor to whom the order is to be granted, must have obtained his judgment against the executor or administrator, *after a trial at law upon the merits*; a judgment obtained otherwise will not entitle the creditor to the order to show cause.(*ll*) The next section provides for the issuing of a citation, requiring the executor or administrator complained of, at a certain time and place therein to be named, to appear and account before the surrogate; and directs that if, upon such accounting, it shall appear that there are assets in the hands of the executor or administrator properly applicable to the payment, in whole or in part, of the judgment so obtained, the surrogate shall make an order that execution be issued for the amount so applicable.

The proceeding to procure the order for the issuing of the execution, is by petition of the creditor to the surrogate, setting forth that he has obtained a judgment against the executor or administrator, after a trial at law upon the merits, stating the amount and date of the judgment, and the court in which it was recovered, and praying an order that the executor or administrator show cause why an execution should not issue, and also a citation for him to account. On filing the petition, the order to show cause is made, and the citation issues. The order, and also an order for the issuing of the citation, must be entered in the surrogate's minutes. (For forms of the application, orders and citation, see Appendix, No. 51.)

The number of days' service of the order and citation which must be allowed, is not specified; but as an account is required, and as the order to account is a thirty days' order, that number should probably be given. Disobedience to the order and citation may be punished by attachment.

On the return day, the parties having appeared, the executor or administrator must submit an account of his proceedings, as far as he has advanced in the administration. It does not seem to be expressly required that the account should be accompanied by vouchers. In analogy with the rule prescribed by the Chancellor in *Williams v. Purdy*(*m*) and *Gardner v. Gardner*,(*n*) for the usual account rendered in the Surrogate's Court. The account should, however, doubtless be under oath. The justness and correctness of the account may be contested by the creditor, and witnesses may be examined as to the truth of any of the items or charges contained therein. The proceedings on the investigation will be governed by the same rules which apply to the final settlement of an executor's or administrator's accounts. Such settlement forms, in part, the subject of a separate future chapter of this work;

(*l*) 2 R. S. 116; 4th ed. 301; *Ante*, p. 321.

(*ll*) See *Davies v. Skidmore*, 3 Hill, 503, *per* Bronson, J.

(*m*) 6 Paige, 166.

(*n*) 7 Id. 112.

and, to avoid a repetition, the reader is referred to that chapter for the directions necessary for the present purposes.^(o)

It will be observed that the creditor, in the case under consideration, is entitled to apply for an order to account, immediately after having obtained his judgment, and, consequently, that these proceedings may take place within a short time after the appointment of the executor or administrator, and before he can have had an opportunity to ascertain by advertisement in the mode prescribed by law, all the claims against the estate.

It has been seen that the statute regulating the publication by the executor or administrator of the notice for creditors to exhibit their claims, does not authorize such publication until at least six months after the granting of the letters testamentary or of administration, and requires such publication to continue for the space of six months. One year, then, from the date of his appointment, is the shortest time within which the executor or administrator can discover the extent to which the assets in his hands may be liable to creditors. It will be remembered, also, that the obtaining of the judgment against the executor or administrator, does not entitle the debt to any preference over others of the same class. Although, therefore, the account may show a large amount of funds in the hands of the executor or administrator, if there be any uncertainty as to the amount of outstanding liabilities, the surrogate will, in most cases, entertain some scruples as to ordering an execution. It is not perceived how, at an early stage of the administration, the executor or administrator, or the surrogate, can possibly determine whether there are assets properly applicable to the payment in whole or in part of the judgment, or not. The mere suggestion of a doubt on the point, would probably be sufficient to deter the ordering of an execution. If the application for the order be made previous to the expiration of a year from the time of the appointment of the executor or administrator, the surrogate will require the most conclusive proof on the part of the creditor, of the absolute sufficiency of the assets to warrant an execution for either the whole or such part of the judgment as may be insisted upon, before granting the order.

If the year has elapsed, there would seem to be less difficulty in the case. The executor or administrator's account will then show what claims have been presented under his notice; and, the liabilities of the assets having been thereby ascertained, the amount applicable to the judgment can be determined with comparative accuracy. In fixing such amount, allowance will have to be made for contingencies and future expenses of the administration.

If, on being called upon, after the expiration of the year, to show cause why an execution should not issue upon a judgment obtained against him, the executor or administrator should allege that he had not yet advertised for claims, and that consequently the proportion of the assets applicable to the judgment could not be determined, the surrogate would at least throw the burthen of the proof upon him, and compel him to show that there were outstanding claims and insufficient assets; and if the omission to advertise should cause an adjournment

(o) See *post*, ch. 12. The form of the account will also be there found described.

of the matter, his authority ought to enable him to charge the executor or administrator personally with the expenses, as a penalty for such neglect of his proper duty.

If in any way it should be satisfactorily established by the proceedings that there are assets properly applicable to the payment in whole or in part of the judgment, the surrogate will grant an order for the issuing of an execution for the amount so applicable, after leaving a sufficient proportionable sum in the executor's or administrator's hands to meet contingencies and future expenses of the administration. Such order should contain a summary statement of the account, showing the basis upon which the amount applicable to the judgment has been calculated and fixed. (For form of the order, see Appendix, No. 52.)

Where the executor's accounts have been "rendered and settled" before the surrogate, it is unnecessary to procure an order from the surrogate to issue execution. The statute provides, in such case, that the execution shall issue only for the sum that shall have appeared on the settlement of such account, to have been a just proportion of the assets applicable to the judgment." Therefore, where the amount of assets is less than the amount of the judgment, it is irregular to issue execution for the whole amount of the debt.(oo)

The execution will direct the money to be levied of the goods, &c., of the testator or intestate.(p) It will be governed by the same rules, as to the time at which it may be issued; and as to its return, as prevail in respect to other executions in the court in which the judgment may have been recovered.

The next section, numbered 22, [sec. 21,] enacts, that the order for the issuing of the execution shall be conclusive evidence of the sufficiency of the assets to the extent allowed to be levied; and the 23d section [sec. 22,] provides for the granting of further orders, and the issuing of further executions in cases where the same may be necessary and proper.(pp)

(oo) *Olmslead agt. Vredenburg*, 10 Howard's Prac. Rep. 215.

(p) Where judgment is obtained against the personal property of a deceased debtor, and the execution is issued against his executors, describing them in their representative capacity, such description alone is insufficient to prevent the sheriff from levying upon the individual property of the executors.

Where, in such case, it is intended to collect the amount out of the assets in the hands of the executors, the execution, under sec. 239 of the Code of Procedure, should require the officer to satisfy the judgment out of the property which, according to the judgment, is liable for its payment. *Olmslead agt. Vredenburg and another, Executors, &c.*, 10 Howard's Prac. Rep. 215.

(pp) The sections thus considered are taken from, and, in a degree, are conformable to the rules which prevailed in courts of law previous to the Revised Statutes, relative to the prosecution of suits against executors and administrators. The plaintiff, if he recovered, obtained judgment and had execution awarded for the whole amount of his debt, if the assets remaining in the hands of the executor or administrator were sufficient; and if the assets were insufficient, then provision was made for reaching future assets. The judgments against the executor or administrator had preference according to the priority of time in which they were respectively recovered, and the first might sweep away all the property. (See Wms. on Exrs., book 2, chap. 1; 1 R. L. 1813, 315.) Although this system of preferential administration was essentially abolished by the plan proposed and adopted in the Revised Statutes, the revisers seem to have been unable entirely to divest the new provision of the accustomed machinery by which it was conducted, and remnants of it, inconsistent with the general scope and object of the reformed system, and which are to be found in the 31st section, 2 R. S. 83, already treated of in these sections and in others, were permitted to linger in the rules which they introduced.

Besides the proceedings under the sections thus considered, the creditor who has obtained a judgment against an executor or administrator, after a trial at law upon the merits, has a remedy for the collection of his judgment after six months shall have elapsed from the granting of the letters testamentary or of administration, under the above recited 18th section of the "act relative to the rights and duties of executors and administrators,"(g) which will presently be more fully treated of. He may also, after the expiration of eighteen months from the granting of the letters, compel the executor or administrator to render an account and distribute the assets, under the provisions of the statutes regulating the rendering and settling of the accounts of executors and administrators, likewise above referred to, and which also will be hereafter discussed.

Of enforcing a Judgment obtained against an Executor or Administrator otherwise than after a Trial at Law upon the Merits.

The sections numbered 20, 21, 22 and 23, which have thus been considered, apply, as has been noticed, solely to judgments obtained against an executor or administrator, after a trial at law upon the merits. The section numbered 32,(r) provides for all judgments against executors or administrators, whether obtained after a trial upon the merits or otherwise. No execution shall issue until an account shall have been rendered and settled, or unless on an order of the surrogate.

There is an intimation, in the case of *The People v. The Judges of the Albany Mayor's Court*,(s) that the power of the surrogate to permit an execution to issue by an order under the thirty-second section, is to be limited to the case of a *defended* suit, mentioned in the nineteenth section, [sec. 20.] This was not so understood in the previous case of *Winne v. Van Schaick*,(t) and it would seem that the language of the statute is too broad and unqualified to fairly authorize such a restricted interpretation.(u)

The case in which the surrogate may grant the order, is that of a judgment obtained after a trial upon the merits. That portion of the section which speaks of the order, is to be understood, not as conferring a power to make an order in any case, but as referring to express provisions elsewhere enacted, for the issuing of an execution on the order of the surrogate, and without a settlement of the account, which are the provisions contained in the above four sections, numbered 20, 21, 22 and 23. In all cases, then, where a judgment shall have been obtained against an executor or administrator, otherwise than after a trial at law upon the merits, an account of the administration must be rendered and settled before execution can issue. This, also, is to be understood, not as conferring a power to compel the rendering and settling of the account whenever a judgment shall be obtained against the executor or administrator, but as referring to express provisions elsewhere prescribed for the rendering and settling of the accounts of

(g) 2 R. S. 116; 4th ed. 300; *Ante*, p. 325.

(r) 2 R. S. 88; 4th ed. 274; *Ante*, p. 321.

(s) 9 Wen. 489.

(t) *Ib.* 448.

(u) *Buller v. Hempstead's Administrators*, 18 Wen. 669.

executors and administrators, and which are above summarily quoted, and are to be found at length in the next article of the statutes.^(v) Under those provisions, an account cannot be compelled until after the expiration of eighteen months from the time of the granting of the letters. Except in as far as the rendering of an account is required by the four sections which have been already considered, those provisions respecting the accounting at the expiration of the eighteen months, are the only ones regulating the rendering and settling of the accounts of executors and administrators, and they contemplate the final adjustment of the affairs of the administration. It follows that, before the remedy upon a judgment obtained against an executor or administrator, otherwise than after a trial upon the merits, can be consummated, the period of eighteen months must have elapsed from the granting of the letters testamentary or of administration, as previous to the expiration of that period the executor or administrator cannot be compelled to render and settle his account. After the accounting clearly, an execution may be ordered for the just proportion of the assets applicable to the judgment.

The last clause of the same thirty-second section enacts, that if an account has been rendered and settled, execution shall issue only for the sum that shall have appeared, on the settlement of such account, to have been a just proportion of the assets applicable to the judgment. This is a similar provision, as will be observed, to the one contained in the twenty-first [20th] section,^(w) for fixing the amount for which execution shall issue on a judgment obtained after a trial at law upon the merits. But there is no provision, as in that case, for obtaining further orders and issuing further executions, from which it may be inferred that the rendering and settling of the account intended by the thirty-second section, is one to take place when the estate is in such a situation as that the entire and exact amount applicable to the judgment can be definitively determined.

A creditor, then, who has recovered a judgment at law against the executor or administrator by default, or otherwise than after a trial upon the merits, must await the expiration of the eighteen months before he can obtain execution thereon, and then he must call the executor or administrator to an accounting before the surrogate, if he do not voluntarily proceed to such accounting. And the surrogate, upon the adjustment and settlement of the account, may order an execution to issue upon the judgment, for the amount justly applicable thereto, if such order be demanded. Where a creditor recovered judgment by default against the defendant, sued as an administrator, and issued an execution without previous leave from the surrogate, and before the settlement of the defendant's accounts as administrator, the court, on motion, set aside the execution.^(x)

The proceedings on compelling an executor or administrator to account, and on the rendering and settlement of his account, will be treated of under a separate head, at a future page of this work ;^(xx)

(v) See *post*, ch. 12 ; 2 R. S. 91 ; 4th ed. 277.

(w) 2 R. S. 116 ; 4th ed. 301 ; *Ante*, p. 321-22.

(x) *Winn v. Van Schaick, Administrator, &c.*, 9 Wen. 448.

(xx) See *post*, ch. 12.

and the issuing of executions, as well under the above four sections, numbered 20, 21, 22 and 23, as under this thirty-second section, will be resorted to, in connection with that branch of the subject. It will there appear that, on such settlement, the surrogate may decree payment of the judgment, or its just proportionable share of the assets, and that such decree, with the subsequent proceedings thereon, authorized by the statutes, affords, in nearly all instances, a more effectual remedy than is provided by the sections which have now been considered, and almost entirely supersedes the necessity of issuing an execution upon the original judgment at all. The eighteenth section of the act concerning the rights and duties of executors and administrators,^(y) above quoted, which was before spoken of, and which will presently be considered, also provides a remedy in the case of a judgment obtained otherwise than after a trial upon the merits.

Of the Enforcement of Debts against the Estate, whether in Judgment or not, by Proceedings in the Surrogates' Courts.

By the 18th section of the act concerning the rights and duties of executors and administrators^(z) just alluded to and above quoted, upon the application of a creditor, the surrogate may decree the payment of any debt, or a proportional part thereof, against the executor or administrator of a deceased person, at any time after six months shall have elapsed from the granting of the letters testamentary or of administration.

The statute respecting the publication by the executor or administrator of a notice to creditors to exhibit their claims, as has been seen, does not allow of the completion of such publication within less than one year from the granting of his letters. At the expiration of that period, therefore, and not until then, can the executor or administrator be presumed to know the exact condition of the estate, and whether the assets in his hands will be sufficient to discharge all the claims for which they are liable. He is bound to pay the debts in the order and according to the classes prescribed by the statute, and if he pay a claim of an inferior degree whilst there are claims entitled to a priority remaining unsatisfied, and there should be a deficiency of assets to discharge the latter, or if he pay a debt of the fourth class in full or in part, and the assets should be inadequate to pay all the others of the same class in full, or in the same relative proportion with the one whereof he had already paid a part, he will be guilty of a *devastavit*, and will render himself personally accountable. After the year he can estimate the share to which each claimant will be entitled, and proceed to make payments. If, then, the executor or administrator refuse to make payments while he cannot be in a situation for forming such estimate, clearly no blame can be attached to him. So the circumstances of the case are seldom such that a decree for payment can properly be made until the year has elapsed, and the time has arrived when it may be presumed that the sufficiency or deficiency of the assets can be ascertained.

(y) 2 R. S. 116; 4th ed. 300; *Ante*, p. 325.

(z) 2 R. S. 116; 4th ed. 300; *Ante*, p. 325.

Chief Justice Nelson, in *Butler and others v. Hempstead's Administrators*,^(a) says, in regard to this section of the statute, "These provisions are useful where the estate is readily settled or clearly solvent;" and, speaking of the same section in the subsequent case of *Fitzpatrick v. Brady and others, Executors, &c.*,^(b) he says, "The statute prescribing and regulating the duties and obligations of executors and administrators, virtually allows them eighteen months after letters testamentary or of administration, to settle the estate, for the purpose of securing more effectually the leading feature of the new system, to wit, a *pro rata* distribution of the assets among the creditors in case of a deficiency. This is the legal effect of the several sections in the 2d and 3d articles of the Revised Statutes relating to the payment of debts, &c., and the making of distribution by executors and administrators. (2 R. S. 27; 2d ed. Id. 32.) They cannot be compelled to render their accounts, nor can they voluntarily render them before the surrogate agreeably to these articles, until after the expiration of the period mentioned. (Id. 32, sec. 52; Id. 35, sec. 70.)

"But power is conferred upon the surrogate to inquire into the condition of the assets short of this period, at the instance of a creditor; and if they are found sufficient and available, the surrogate may direct the payment of the debt, or a proportional part of it, as the state of the assets at the time shall seem to warrant. This was the object of the provision in question. (Id. 52, sec. 18. See, also, secs. 20 to 23.)"

If the executor or administrator be perfectly satisfied that the assets will prove ample, he will not refuse, even immediately after obtaining his letters, to meet a demand properly substantiated. But if there be reason to doubt the sufficiency of the assets, he is entitled to defer payment for the year at least.

Accordingly, this 18th section, so far as payments may be required under it before the expiration of the year, is of but little practical utility. If a creditor take proceedings under it before the year has expired, he will be obliged to establish absolutely the liability of the executor or administrator to make immediate payment of his demand. He may be a judgment creditor of the deceased, and prove that there are no other judgments against him, and that all debts of a prior class are paid, and show by the inventory that there is a large balance remaining in the hands of the executor or administrator. But any reasonable doubt raised by the executor or administrator will be sufficient to defeat the application, or, at any rate, to cause the surrogate to require, as it is probably competent for him to do, that the party give a bond of indemnity before receiving payment, in analogy to the case of the discharge of a legacy before the expiration of the year.^(c)

A similar difficulty to that here spoken of occurs, as will be remembered, in proceedings on an application, made before the expiration of the year, for an order to issue an execution upon a judgment recovered against the executor or administrator, after a trial at law upon the merits. These different provisions for ascertaining the amount of claims

(a) 18 Wend. 669.

(b) 6 Hill, 581.

(c) See *post*, ch. 11; 2 R. S. 90; 4th ed. 276.

for regulating and for compelling payments, do not seem to have been framed with very precise reference to each other, and are not easily reconcilable.

After the expiration of the year, when it may be assumed that the executor or administrator has advertised for and ascertained the claims against the estate, the difficulty thus pointed out, in obtaining a decree under this 18th section, can no longer exist. The mode of proceeding, however, to be adopted in seeking the remedy afforded by the provision is not prescribed, either by the section itself or in any other part of the statutes. In such proceedings before a surrogate, the parties ought to make statements of their claims in the nature of pleadings, in order that the parties and the court may be apprised of the questions in issue.(cc) The ordinary practice is for the creditor to petition the surrogate for relief under the section.

The petition of the creditor should contain the proper averments to show jurisdiction, and should state the time of the appointment of the executor or administrator, and the nature and amount of the debt. It will hereafter appear, in connection with the subject of the accounting of executors and administrators in the Surrogates' Courts, that it is a question whether the surrogate has jurisdiction to inquire into or decide upon the validity or amount of a debt against the estate. The petitioner will, therefore, do well to set forth in his petition that his claim has been presented to the executor or administrator and assented to by him, or that it has been established as valid, and its amount fixed by a judgment or otherwise, as the case may have been. He should also aver that he has demanded payment of the claim from the executor or administrator since the expiration of a year from the granting of the letters; and unless such demand has been made and is alleged in the petition, or proved in the course of the proceedings, although payment may be decreed, the petitioner will have to pay the expenses of the proceeding, because it would not appear but that such application for payment would have realized the claim, and rendered unnecessary the calling of the executor or administrator before the surrogate. The petitioner should also allege, if he have knowledge or information of the fact, that assets applicable to his claim, and sufficient for the payment thereof in whole or in part, have come into the hands of the executor or administrator. He should also, in his petition, demand of the executor or administrator an account of the property of the deceased which such executor or administrator has received, or, that he admit a sufficiency of assets. He may also include in his petition any fact or circumstance, within his knowledge or information, respecting the situation of the estate, or the conduct of the executor or administrator, which he may deem calculated to strengthen his application; and all the material statements in the petition, if the same be sworn to, will be held evidence for the party on the hearing of the matter, unless they are denied and disproved. The petition will conclude with a prayer for a decree for payment of the claim, pursuant to the section under consideration. (For form of the petition, see Appendix, No. 57.)

(cc) See *Van Vleck v. Burroughs*, 6 Barb. Sup. Ct. Rep. 341.

On filing the petition, the surrogate issues a citation to the executor or administrator, requiring him to appear before him and show cause why payment of the debt should not be decreed. The citation should be served at least four days before the day fixed for the hearing.(d) Directions for such service should be included in the order for the issuing of the same. (For forms of the order and citation, see Appendix, No. 58.)

On the day appointed, if the executor or administrator fail to appear, a decree for payment of the claim will go against him by default. It will be observed that the section under consideration says nothing of the citation to show cause. The decree, for aught appearing in the statutes, might be made *ex parte* on the application and proofs of the claimant only, and without notice to the executor or administrator. The preliminary citation is, therefore, in view of the words of the statute alone, strictly a favor to the executor or administrator, and he will not be entitled, on showing cause or in the course of the proceedings, to any further indulgence.

If the executor or administrator appear on the return of the citation, he may set up, in answer to the petition, unsettled demands, or suits pending against the estate, or any other matter which may show uncertainty as to the assets, or furnish a cause why the decree should not be made. But in order to maintain such a defence, it will usually be necessary for him to bring in an account, which he may do on the day appointed for showing cause; or further time, not exceeding thirty days, in analogy to the statute relative to accounting, will be allowed him for the purpose. And if the executor or administrator, in answering the petition, do not render an account, or apply for further time to enable him to do so, or otherwise distinctly show a deficiency, it will be held an admission of sufficient assets in his hands applicable to the petitioner's claim. Aside from the question of the jurisdiction of the surrogate to determine a disputed claim, if the executor or administrator seek to avail himself of the Statute of Limitations, he must state such defence in time to enable the creditor to meet it by proof. It is too late to do so when the cause is submitted on written points, after the evidence is closed.(e) The answer should be put in under oath. From the account, if one be rendered, the adequacy of the assets and the proportional part to which the claim is entitled, may be adjudged.(f)

The justness and correctness of the account may be litigated, but the statute not expressly requiring one to be filed, it probably need not be under oath, nor accompanied by vouchers. The executor or administrator, however, will be guided, with respect to these particulars, by the circumstances of the case, and the charges and proofs brought by the claimant. Witnesses may be examined as in other cases, touching any question arising on the petition of the creditor, or the answer or account of the executor or administrator. The proceedings, on contesting the account, will be similar to those hereafter to be described

(d) It is submitted that it would be correct practice to serve a copy of the petition on the executor or administrator at the time of the service of the citation; but this has not been usual.

(e) *Van Vleck v. Burroughs*, 6 Barb. Sup. Ct. Reps. 341..

(f) For form of the account, see *post*, ch. 12, and Appendix.

on an accounting by an executor or administrator, after the expiration of eighteen months from the time of his appointment. The decree will recite the substance of the petition, or of the proofs relative to the claim of the creditor, and the situation of the assets, as may have appeared from the answer or account of the executor or administrator, or the evidence adduced in respect thereto, and will order payment of the claim in whole or in part, according to the decision of the surrogate thereon. (For form of the decree, see Appendix, No. 59.)

The costs and expenses of obtaining the decree, if the proof showed a fair case for reasonable doubt as to the payment, would be chargeable upon the estate; if misconduct on the part of the executor or administrator has been proved, they should be charged on him personally. In other cases, they should be borne by the petitioner.

Whether, upon an application for a decree for payment of a debt under this section of the statute, the surrogate has jurisdiction to try the validity of the alleged claim, is a question in respect to which there has been some conflict of opinion. The consideration of this question involves an examination of provisions of the statutes, not strictly among those embraced within the subject matter of the present chapter, but which will properly be included in the chapter of this work treating of the subject of the accounting of executors and administrators, and is therefore, for the present, deferred to be inserted in that chapter. It should, however, be mentioned in this place, that the better opinion is that the surrogate has not jurisdiction to try or determine the validity of claims alleged against the estates of deceased persons.^(g)

Though the creditor of a decedent apply to the surrogate for a decree directing the payment of a debt, under this 18th section, and the surrogate, after citing the executors or administrators, decide against the validity of the debt, and deny the application on that ground, the decision will not conclude the creditor in an action afterwards brought against the executors or administrators to recover the same debt.^(gg)

If, on showing cause after the expiration of the year, why a decree for payment of a claim not disputed should not be made, the executor or administrator allege that he has not advertised for claims against the estate, pursuant to the statute, and that, therefore, the amount to which the creditor is entitled cannot be ascertained, it will rest in the discretion of the surrogate, governed by the facts of the case, whether a decree for payment shall be made against him or not. If the decree be refused in consequence of his neglect to advertise, he should certainly, at any rate, be charged personally with all the costs and expenses of the application.

A creditor who has recovered a judgment against the executor or administrator, whether after a trial upon the merits, or otherwise, may,

^(g) See, in support of the proposition that the surrogate has jurisdiction in the case under consideration. *Fitzpatrick v. Brady*, 6 Hill, 581; *Kidd v. Chapman*, 2 Barb. Ch. Rep. 414; *Flagg v. Ruden*, 1 Bradf. Surr. Rep. 192; *Campbell v. Bruen*, Ib., 224; *Waydell v. Velie*, Ib. 277; *Hall v. Bruen*, Ib. 435; *Jennings v. Phelps*, Ib., 435; *Eitel v. Walter*, 2 Ib. 287; *Bowen v. Bowen*, Ib. 336. On the other side, *In the Matter of the estate of John Kent*, Dayton's Surrogate, (1st ed.) Appendix vii.; *In the Matter of the accounting of Jones, Executor, &c., of John Mason, deceased*, 5 N. Y. Legal Observer, 124; *Magee v. Vedder*, 6 Barb. Sup. Ct. Rep. 352; *Wilson v. The Baptist Education Society*, 10 Barb. Sup. Ct. Rep. 308.

^(gg) *Fitzpatrick v. Brady*, 6 Hill, 581.

it is plain, resort for his remedy to the section which has thus been considered. His decree, however, it may be remarked, will be, not for the issuing of an execution, but for payment of the amount of the judgment, or the due proportionable part thereof.

The decree of the surrogate for payment of the claim, may be enforced by proceedings under the 19th section of the same statute,^(h) or the 63d, 64th and 65th sections of the law of 1837, S. L. 1837, p. 531, as amended by the act of 1844, S. L. 1844, p. 91.⁽ⁱ⁾ Those sections may be more conveniently considered in connection with the subject of the surrogate's decree on an accounting, which is hereafter to be discussed. The reader is referred to that portion of this work where such decree is treated of, for the practice under those sections in the present case.^(j) The observations there made respecting their provisions, will be found applicable in every particular to a decree for the payment of money, under the section which has now been considered.

An action at law on the decree may also be brought against the executor or administrator.

The provisions of the statutes for compelling the executor or administrator to render an account, and make payments after the expiration of eighteen months from the time of the granting of his letters, are above quoted, and reference has been several times made in the remarks upon other sections to proceedings on such an accounting. The remedy furnished by those provisions is more general and comprehensive than that afforded under any other sections of the statutes. It extends to all claims, whether of creditors, legatees, widow or next of kin. As the subjects of the discharge and payment of legacies, and of the distribution of the surplus, after the payment of the debts, have not yet been considered, and as the accounting in question takes place at a period in the administration when the conduct of the executor or administrator, in the discharge of his trust, may be finally examined into and passed upon, it is proposed to defer the consideration of those provisions until they can be treated of with reference to every species of claim which may be enforced under them, and all the previous duties of the executor or administrator have been in their due order discussed. The reader is therefore referred to that head of this work, where such accounting is considered for the practice and forms of proceedings, on compelling an executor or administrator to pay the debts of the deceased, under the provisions of the statutes regulating the rendering and settling of the accounts of executors and administrators.

Of the Ascertainment of the Debts of the Deceased by the Publication by the Executor or Administrator of a Notice to Claimants to exhibit their Claims, and the subsequent Proceedings thereon.

The above sections, numbered 34 to 38, both inclusive,^(k) provide for the publication, by the executor or administrator, once in each week,

(h) 2 R. S. 116; 4th ed. 300.

(i) 2 R. S. (3d ed.) 320; 4th ed. 421, excepting in the latter the 64th section.

(j) See *post*, ch. 12.

(k) 2 R. S. 88-9; 4th ed. 274-5; *Ante*, p.

for six months, of a notice to creditors to exhibit their claims, with the vouchers thereof, to such executor or administrator, and prescribe the duties and proceedings of the executor or administrator, and of the creditor, on the presentation of claims under such notice. The 39th and 40th sections provide for claims not presented under the notice, and the 41st section deprives the plaintiff of costs in suits brought for such claims; and further provides, that costs shall not be recovered in any suit at law against any executor or administrator, unless it appear that the demand on which the action was founded, was presented within the time aforesaid, that its payment was unreasonably resisted or neglected, or that the defendant refused to refer the same pursuant to the preceding provisions. The object of the publication of this notice is, as has been seen, to enable the executor or administrator to ascertain, within a convenient period, the total amount of the debts to which the assets in his hands are liable, so that he may correctly apportion such assets among the different claimants. Without some such contrivance, as all claims, after the comparatively few included* in the first three classes of the 27th section,^(l) share the assets *pro rata*, the executor or administrator could never know to how much each was entitled, and could not pay, to any, without danger of committing a *devastavit*.

The terms of the 34th section are, that the executor or administrator at any time, at least six months after the granting of the letters testamentary or of administration, *may* publish the notice therein described; but he is not at liberty, because of this merely permissive language, to omit availing himself of the section. The Legislature do not enjoin the publication of this notice absolutely as a duty, because it is intended entirely for the protection of executors and administrators. Besides, there may be cases in which it would be unnecessary, as where the creditors are all well known, and their demands admitted, or where the estate is abundant, and the executors or administrators the sole successors or distributees.

But the delay of the executor or administrator in publishing the notice, should not be allowed to prejudice any person having a claim against the estate. He will be inexcusable, if, when the time for making payments has arrived, he have no other reason for refusing to meet the demands than his own negligence, in not having advertised for claims, and will be held debarred from all the privileges and exemptions to which the due publication of the notice would have entitled him. In *Harvey v. Skillman's Executors*,^(m) where the executor had omitted to advertise for claims, and, after demand of the account and allowing a reasonable time for settlement, the plaintiff had brought a suit, and recovered a judgment against the executor, the estate of the testator was held liable for the plaintiff's general costs in the cause; and it was decided that, under those circumstances, the plaintiff is entitled to costs, as in other cases, without showing that the demand was unreasonably resisted or neglected, or that the defendant refused to refer the matter in controversy; and that it is not necessary in such case

(l) 2 R. S. 87; 4 ed. 272; *Ante*, p. 284.

(m) 22 Wend. 571.

to produce the certificate of the circuit judge before whom the cause was tried, or other evidence as in other cases, to enable the court to determine whether the costs shall be awarded against the property of the defendant or of the deceased. It is enough in such case, to show that the notice to exhibit claims had not been published. - And Mr. Justice Cowen, in delivering the decision of the court, in that case, speaks of the neglect of advertising for claims on the part of an executor or administrator in terms of manifest censure. After reciting the provisions of the above sections of the statute, numbered 34 to 41, both inclusive,⁽ⁿ⁾ particularly those of the 41st section, he says:

"I am of opinion, that in this case the defendant can claim no protection whatever from any of the provisions in 2 R. S. 88-9, to which I have adverted. These give to executors and administrators a right, if they think proper, to proceed summarily in liquidating the amounts of debts due from their testators or intestates, and attach certain privileges in the distribution of assets, if the creditors shall not follow them in these purposes; and then, after all this, comes the 41st section, entitling them also, as well as the estate which they represent, to an almost entire exemption from costs, especially when we consider the great favor and indulgence with which they have been regarded by the cases that have arisen and been decided under the statute." And after reviewing the numerous previous cases relating to costs against executors and administrators, hereafter to be noticed in this treatise, in connection with the subject of costs generally,^(o) the distinguished justice proceeds as follows:

"In all the cases I have cited where costs have been denied, though the fact is not always stated in the report, no doubt it must have appeared that the executor or administrator had given public notice, and complied in all respects with the statute prescribing his ulterior course. Then he may demand the oath of the party, and may require, and must not refuse to refer, and then he may claim to be excused costs, if he be finally sued. I will not again repeat the words of the 41st section. It is quite clear on reading it, with a view to the previous sections, that it never was intended for a *suit* against an executor or administrator, entirely in the abstract, not preceded by any efforts on his side to bring about a settlement, such as he is, by the statute, authorized to make. If he have given no notice, how can the creditors know when or where to present their claims, and what chance have they to avoid a resort to the ordinary and more dilatory and expensive process of law? I admit that some of the words in the 41st section are quite general when taken by themselves; for instance, these:—"Nor shall any costs be recovered in *any suit at law* against *any executors or administrators*, to be levied of their property, or of the property of the deceased, unless it appear," &c. But the words which immediately follow, show what predicament the defendant must belong to, in order to make the previous words apply. They are, unless the demand was presented to the defendant, pursuant to the notice which he had given, and was unreasonably resisted, or there was a refusal to refer, &c. Shall it be

(n) 2 R. S. 88-9; 4th ed. 274-5; *Ante*, p. 323, 325.

(o) See *post*, chap. 15.

said that the executor may go about his own private business, or abroad on his travels, or entirely neglect to publish time and place, according to the 34th section? It was said, in *Swift v. Blair's Executrix*,^(oo) that the plaintiff asking for costs must bring himself strictly within the statute; that is to say, after the executor has given him a chance, he must not be backward in trying to avoid protracted litigation; but I will add, that before he can be called on to join in the measure, the executor must show that, on his part, he has taken such steps as have afforded an opportunity to do it. In order to that, the executor or administrator must himself have strictly complied with the statute, by giving the notice and following it up. He must put the plaintiff in default; and if otherwise, while the executor, &c., cannot insist on his readiness to refer the matter, so he cannot put forward any other excuse against costs contained in the 41st section. If tried at the circuit, no certificate is necessary to entitle the plaintiff to costs. If referred, or there be a default or *cognovit*, no inquiry on affidavit as to which party was in fault can be allowed, farther than to see the omission to give notice, or other act of neglect on the side of the defendant, by which he has lost all protection from the statute."^(p)

It will be observed, that the statute does not authorize the executor or administrator to commence the publication of the notice until at least six months after the granting of the letters testamentary or of administration, and that such publication must be continued for the period of six months, so that one year after his appointment is the shortest time within which the executor or administrator can complete the advertisement, and discover the total amount of the debts to which the assets in his hands are liable.

Before advertising, the executor or administrator applies to the surrogate to ascertain the newspapers which he may deem most likely to give notice to the creditors. The application need not be in writing, nor is there any particular formality to be gone through with on applying. The proceeding is not usually accompanied by any investigation, although in order that the surrogate may judge in how many papers the notice ought to be published, so as to give notice to all the creditors, the situation of the business of the deceased at the time of his death, and the probable number and the residence of his creditors, might reasonably be inquired into. The executor or administrator should consider it a part of his duty, on applying to the surrogate to ascertain the papers he may deem most likely to give the proper notice, to state to the surrogate all the information he may possess as to the probable number and the residences of the creditors of the deceased. And the surrogate may require information from other persons in order to determine the proper papers in which the notice shall be published. But

(oo) 12 Wend. 278.

(p) In *Bullock v. Bogardus*, (1 Denio, 276,) however, it was held that the omissions of an executor or administrator to publish a notice, requiring the creditors of the deceased to exhibit their claims, pursuant to 2 R. S. 88, sec. 34, does not subject them or the estate to the costs of a suit subsequently brought; and the case of *Harvey v. Skillman*, so far as it holds a contrary doctrine, was overruled. And the decision in *Bullock v. Bogardus*, has since been repeatedly sustained. See *Wallace v. Markham*, 1 Denio, 671-3; *Russell v. Lane*, 1 Barb. Sup. Ct. Rep. 519, 523; *Van Vleck v. Burroughs*, 6 Id. 341; *Fort v. Gooding*, 9 Id. 388, 390; *Snyder v. Young*, 4 How. Prac. Rep. 217. But see *Whitmore v. Foose*, 1 Denio, 159.

the application to the surrogate is only that he may designate the papers, it is not for authority to publish the notice; nor would there seem to be any propriety, upon the words of the statute, in advising it as necessary, unless it should be expressly demanded by the surrogate, that the application or the partial investigation which may take place on the occasion, should be under oath. The statute directs the notice to be published in as many papers as the surrogate may deem most likely, &c., without expressly requiring him to specify the particular names of the number designated. The uniform practice, however, has been for the surrogate to name one newspaper. The executor or administrator may insert the notice in such paper as he thinks fit in the county. The surrogate may direct it to be published in newspapers out of the county, and sometimes, at the suggestion of the executor or administrator, such a direction is given, but those cases are not frequent. In by far the greater number of instances, both newspapers are of those published in the county. A memorandum of the application and of the names of the papers, is properly entered in the surrogate's minutes. It is in the form of an order, and is called an order to advertise. (For form of the memorandum or order, and also of the notice, see Appendix, No. 53.)

By the above section numbered 35,(g) the executor or administrator may require vouchers for every claim, and the affidavit of the party in support of the same. Such affidavit should follow the words of the statute. (For form, see Appendix, No. 54.)

By the common law, it is the business of the debtor to seek the creditor and offer payment, but by this statute the creditor is to seek the representative of the debtor, and produce the vouchers showing the validity of the claim which he presents.(r)

The object of requiring the affidavit of the creditor is not to prove the existence of the debt, as it is not evidence for that purpose. But it is to prevent the exhibition of fictitious claims against the estate of the decedent which have been discharged by him in his lifetime; and also to prevent the allowance of claims against which there existed a legal off-set, known only to the party presenting such claim, and which those who are interested in the estate of the decedent may be unable to establish by legal proof.(s)

Where the claim is on a promissory note, the payee of the note, having made the usual affidavit of the justice of his demand against the estate of the maker, he is not bound to give the personal representatives of such maker a statement of the several items which formed the consideration of the note.(t)

By the 36th section, if the executor or administrator doubt the justice of any claim presented pursuant to the preceding two sections, he may enter into an agreement in writing for a reference. Such doubt must be distinctly signified, otherwise he will be deemed to have assented to the claim. He may take time to examine into the matter, but

(g) 2 R. S. 88; 4th ed. 274; *Ante*, p. 323.

(r) 7 Wend. 523.

(s) *Williams v. Purdy*, 6 Paige, 169. See, also, *Flagg v. Ruden*, 1 Bradf. Sur. Rep. 157.

(t) *Boughton v. Philips*, 6 Paige, 334.

his final determination should be so plainly expressed to the claimant as to leave no room for any misunderstanding.

After an unqualified rejection of a claim as "unjust and not due," unaccompanied with any offer to refer it, under the statute, the creditor is under no obligation, on his part, to propose a reference. The statute does not say by whom the reference must be proposed. It is probable that either party may submit that proposition.^(u)

The exhibition of a claim to the legal adviser of the executor or administrator in settling claims against the estate, and his rejection of it, is not a compliance with the statute.^(v)

But where an executor or administrator, in his notice, directs the claims to be exhibited to him at the office of his counsel, as is frequently done, the exhibition of claims to such counsel at such office, in the absence of the executor or administrator, ought to be held sufficient. The only ground on which such a notice could be sustained, would be, that the office of the counsel was, *pro hoc vice*, the residence or place of business of the executor or administrator. If he was not to be found there, the counsel would doubtless be considered his agent or representative for the purposes of the claims, and his dispute or rejection of such claims the same as a dispute or rejection thereof by the executor or administrator himself.

And where it appeared that nearly all the communication between the claimant and the administrators was through the plaintiff's attorney on the one side, and the legal adviser of the administrator on the other, who was also the counsel for the defendant in the suit subsequently brought for the claim, and the law partner of the defendant's attorney, and that previously to the commencement of the suit he had stated more than once to the plaintiff's attorney that the administrator refused to refer the claim, although the administrator himself denied such refusal, on a motion for costs, it was considered, that although perhaps counsel cannot, by virtue of his authority, as such, consent or refuse to refer a claim presented against an estate; yet where he is known and admitted to be the general legal adviser of the representatives, they should be deemed bound, on the question of costs at least, by any information he communicates to claimants, respecting a consent or refusal to refer.^(w)

Again, there is not in the statute anything which necessarily requires a personal interview between the claimant and executor or administrator; nor that the evidences of the debt should be laid before the executor or administrator, or that the claimant should make oath of the justice of his claim, unless required to do so by the executor or administrator.^(x)

Where the executor already understands the whole matter, and does not desire that the evidence should be submitted to his examination, it cannot be necessary for the creditor to do more than present his claim; and that may be done through an agent by a written communication,

(u) 9 Barb. Sup. Ct. Rep. 393-4.

(v) *Whitmore v. Foote, Exr., &c.*, 1 Denio, 159.

(w) *Russell v. Lane*, 1 Barb. Sup. Ct. Rep. 519-26.

(x) *Gansevoort v. Nelson*, 6 Hill, 391; *Russell v. Lane*, 1 Barb. Sup. Ct. Rep. 519; *Fort v. Gooding*, 9 Ib. 392.

or in any other way which deals fairly with the executor and the interests which he represents. If the presentation is made by letter, the executor is bound to deal ingenuously with the creditor. If he wishes to see the evidences of the debt, or to have the oath of the creditor to the justice of the claim, he should say so, and not leave the claimant to suppose he has done everything that is wished, and afterwards object that there has not been a more formal presentation of the demand.^(y)

The fact that the claim was presented to the executor or administrator previous to the publication of the notice to creditors, does not, it is held, render the presentation invalid. A creditor has a right to present his claim to the representatives of the deceased at any time, and is not confined to the six months prescribed for the publication of the notice.^(z) And the executor or administrator may, it seems, require vouchers and the affidavit of the claimant, upon the presentation of the claim, whether he has published the notice or not. The 35th section is regarded as independent of and having no reference to the previous section. Its language is general: "Upon any claim being presented against the estate of any deceased person," and its provisions are deemed not restricted to claims exhibited under the notice published pursuant to the 34th section. So the executor or administrator, it is considered, may enter into the agreement to refer, provided for by the 36th section, whether the claim be exhibited, under the notice to creditors, or not. The terms of the last named section are: "If the executor or administrator doubt the justice of any claim so presented, he may enter into an agreement," &c. The words "so presented," relate to the presentation provided for by the preceding 35th section, which, as has been seen, is regarded as general, and having no reference to the publication of the notice. So, if the executor or administrator doubt the justice of a claim presented, he may, it seems, enter into an agreement to refer, although he has not demanded vouchers or an affidavit, pursuant to the 35th section. The requirement of vouchers and an affidavit is not a prerequisite to authorize him to agree to a reference. The claims to be referred are those presented and the justice of which the executor or administrator has doubted. It is not in express terms required that they should be those in respect to which the executor or administrator has called for the vouchers and affidavits. In *Russell v. Lane*^(a) Mr. Justice Hand says: "The power to refer is given by the statute, and perhaps it was intended that the executor or administrator should require the vouchers and affidavit, and then, if he still doubt the claim, he is warranted in consenting to a reference."^(b) But such, it is believed, is not the construction given to the statute by our courts, or by the profession. The executor or administrator may from the first understand the nature of the claim, and be satisfied it cannot be adjusted without the intervention of third persons; and he is not compelled to require an affidavit in all cases." And although the executor or administrator not merely

(y) *Gansevoort v. Nelson*, 6 Hill, 391.

(z) *Russell v. Lane*, 1 Barb. Sup. Ct. Rep. §19.

(a) 1 Barb. 519, 24-5.

(b) "See the remarks of Bronson, J., 6 Hill, 392; and of Cowen, J., 22 Wend. 572."

doubt but absolutely reject the claim, the reference may be had; for the 38th section, when it provides that "if a claim against the estate of any deceased person be exhibited to the executor or administrator, and be disputed or rejected by him, and the same shall not have been referred, the claimant shall, within six months after such dispute or rejection," commence a suit, &c., clearly contemplates a reference, as well of a rejected as of a disputed claim.

The law does not require the offer to refer to be in writing. The practice has been both ways; but an offer to refer by parol is good.^(bb)

The 36th section, under consideration, requires that there should be three referees who must be approved by the surrogate; and upon filing the agreement to refer, and the surrogate's approval, in the office of a clerk of the Supreme Court, or of the clerk of the Court of Common Pleas, of the county in which the parties or either of them reside, a rule shall be entered by such clerk either in vacation or in term, referring the matter in controversy to the persons so selected.

The next section provides for the proceedings before the referees, for confirming or setting aside their report, for the entering of judgment thereon, and for awarding costs; and prescribes the validity and effect of the judgment.

The statute makes no provision for pleadings in these cases of reference. The agreement to refer is the commencement of the suit. It must present substantially the issue between the parties, stating the claim upon one side, and the denial of its justice on the other; it is a substitute for declaration and plea. Questions of some difficulty may yet arise from the construction and operation of this statute, but it is not necessary to anticipate them.^(c) (For form of agreement to refer, and approval of the surrogate, see Appendix, No. 55.)

There should be a record of the proceedings in the court in which the reference is prosecuted, as the same may be necessary for the security of the executor or administrator. The proceeding before the referees is substantially a suit; it is a legal proceeding in a court to ascertain the amount due, and to enforce its collection. No difference is perceived between the proceeding by way of reference and by way of suit, only that in the latter case process issues; in the former, the agreement of the parties supplies the place of process and of pleadings. The judgment is to be valid and effectual in all respects, as if rendered in a suit by the ordinary process; it will therefore authorize an execution.^(d)

The issuing of the execution must be under an order of the surrogate, as in other cases of judgments against executors and administrators. The proceedings before the referees, however, is in effect a trial on the merits; and it is apprehended the plaintiff in a judgment recovered after a trial before referees, would be entitled to an order from the surrogate for the issuing of an execution under the provisions of the statute authorizing such order upon a judgment obtained after a trial at law upon the merits.

^(bb) *Lanning agt. Swarts and others, Admrs., &c.*, 9 How. Prac. Rep. 434.

^(c) *Woodin v. Bagley*, 13 Wend. 455.

^(d) See *Robert v. Diltmas, Admx., &c.*, 7 Wend. 525.

Where a cause is referred on an agreement according to the statute, between the claimant and the executor of a deceased person, and a report is made, and the claimant dies after the report and before judgment actually entered, the court, on motion at a special term, will grant leave to have judgment entered in the names of the original parties, at any time within two terms after the report; the rule for confirmation and judgment to be entered at a general term.(e)

By the 38th section, if the executor or administrator dispute or reject a claim presented, and no reference be had, the claimant must, within six months after such dispute or rejection, if the debt or any part thereof be then due, or within six months after some part thereof shall have become due, commence a suit for the recovery thereof, or be forever barred from maintaining any action thereon, &c.

This short bar of the statute applies only where the demand has been presented in pursuance of public notice to that effect, given by the executor or administrator, agreeably to the 34th section.(f) If, therefore, the executor or administrator omit to publish the notice, a claimant will not be limited to six months after presentation of his demand to the executor or administrator, and his dispute or rejection of the same, within which to commence his suit against him.

And if the creditor present his claim before the time for advertising has arrived, it seems the limitation does not attach.(g) In such a case, if the executor or administrator afterwards advertise for claims, and the claim be not again presented under the notice, and a suit be not brought for it whilst the notice is running, the executor or administrator will doubtless be protected in paying debts, discharging legacies or making distribution after the expiration of the time limited in the notice, by the provisions of the 39th section of the statute.(h) The short bar of six months will not, however, defeat an action brought upon the claim, whether it be commenced before or during the publication of the notice, or afterwards.

When a claim against an estate is not presented to the executor or administrator within the six months prescribed by the above section of the statute, the only effect of the omission is to limit the recovery in a subsequent suit by the creditor, to the amount of the assets in the hands of the executor or administrator at the time of the commencement of the suit, and to deprive the plaintiff of all right to recover costs. The right of action is barred only when the claim was presented, and having been disputed or rejected, was neither referred nor prosecuted within six months thereafter.(hh)

Again, this section, it will be perceived, applies only to cases in which the claim is *disputed* or *rejected* by the executor. It is a highly penal provision, and ought to be strictly construed.(i) Where the

(e) *Burhans v. Burhans*, 10 Wend. 601.

(f) *Whitmore v. Foose, Executrix, &c.*, 1 Denio, 159. It should not escape remark that the views taken of the several sections of this statute, from and including the 34th section, the reasoning upon them and the principle of construction adopted, are substantially alike in this case, and in the case of *Harvey v. Skillman*, 22 Wend. 571, which latter, as has been seen, has been overruled by numerous subsequent cases. See *ante*, p. 348-50; and note.

(g) *Flagg v. Ruden*, 1 Bradf. Surr. Rep. 192.

(h) *Ante*, p. 324.

(hh) *Baggott v. Boulger*, 2 Duer, 160.

(i) *Elliott v. Cronk's Admrs.*, 13 Wend. 39.

witness who presented the claim to the administrator on the behalf of the plaintiff, testified that the administrator said that he did not know whether the demand was just or not, that he had not investigated the affairs of the estate, that he would consult counsel and let the witness know the determination of the defendants, and that he never did subsequently make any communication to the witness upon the subject, it was held not to have been a disputing or rejection of the claim. Even if the administrator had not undertaken to let the plaintiff's agent know his final determination, and had simply said he knew nothing about the justice of the demand, that he had not yet looked into the affairs of the estate, it would not have been a disputing of the account or a rejection of it, within the meaning of this act. The act should be such as fairly to apprise the claimant that his demand would be contested.⁽ⁱ⁾ Where a suit has been brought upon a claim, the executor or administrator ought not to have the benefit of this short limitation prescribed by this 38th section, without giving decisive evidence of the rejection of the claim more than six months before the suit was commenced.^(j)

If the executor or administrator seek to avail himself of the limitation prescribed by this provision, he must be prepared to show a refusal to refer, as well as the omission of the plaintiff to bring his action within the period limited. The section enacts in the case of a claim exhibited to an executor or administrator, and disputed or rejected by him and not referred, and upon which a suit shall not have been brought within six months after such dispute or rejection, and upon which, therefore, a suit is barred by this statute, that any executor or administrator may, on the trial of any action founded upon such demand, give in evidence, in bar thereof, under a notice annexed to the general issue, the facts of such refusal and neglect to commence a suit. This implies that the executor or administrator must propose the reference, when the account is rejected, or that such rejection amounts to a refusal to refer. If the account is admitted there is then nothing to refer. If it is merely doubted, after vouchers have been exhibited, the 36th section makes provision for a reference. The statute does not say by whom the reference must be proposed. It is probable that either party may submit that proposition. But the *refusal* to refer, when delay in bringing the action is urged by the defendant as a bar, is a part of the defendant's proof. This refusal may be either by the rejection of the plaintiff's offer, or by some equivalent act on his part. An unqualified rejection of the claim, unaccompanied with an offer to refer, is equivalent to a refusal to refer.^(k)

The reference is optional with the executor or administrator. If he refuse to refer, however, and the claimant afterwards recover in a suit against him on the demand, by the above section numbered 41, the executor or administrator may render himself personally chargeable with the costs.^(l)

The provision for a reference was made for the benefit of the creditor, as well as the representatives of the deceased. It may not be

(i) *Elliot v. Cronk's Admrs.*, 13 Wend. 39.

(j) *Reynolds, Admr., &c. v. Collins, Exr., &c.*, 3 Hill, 36.

(k) *Fort v. Gooding*, 9 Barb. Sup. Ct. Rep. 394, *per* Willard, Justice.

(l) *Robert v. Dittmas, Adm'r., &c.*, 7 Wend. 527; *Swift v. Blair's Ex'r.*, 12 Wend. 278.

said that the executor or administrator is bound to refer under all possible circumstances; but as a general rule, he ought not to decline that mode of testing the validity of a demand which he is not prepared to admit.*(m)*

By the above section, numbered 39, the executor or administrator is protected in case of a suit brought upon a claim, not presented under the notice, against liability on account of payments made before such suit commenced, of claims of an inferior (or, it is presumed, of the same) degree, or of legacies or distributive shares. By the fortieth section, the plaintiff in such action can take judgment only for assets remaining in the hands of the executor or administrator, or for assets *in futuro*. But, by the forty-second section, the creditor in such case may recover for his claim in the manner prescribed by law against the legatees or next of kin of the deceased. Previous to the enactment of the Revised Statutes, an executor or administrator, although he was not liable for the payment of debts of an inferior degree, when there were debts unpaid of a higher degree of which he had not any notice, yet he was bound to take notice, at his peril, of debts of record.*(mm)* It may, perhaps, be doubted, whether judgments against the deceased were in the minds of the Legislature when speaking of claims upon which suits were to be brought against the executor or administrator, but the language of the new provisions is sufficiently general to include such judgments; and those provisions, doubtless, require that, in order that the executor or administrator shall be held liable for the payment of judgments against the deceased, that they shall be presented under the notice in the same manner as other claims against him.

With respect to contingent liabilities of the deceased, such as upon covenants in leases not yet broken, but which may or may not be broken hereafter, or upon bonds by way of indemnity, or as surety, of which the conditions have not become forfeited, but which may hereafter become forfeit, if such claims be presented to the executor or administrator under the notice, it will be a question, probably, to be determined upon the proceedings for the settlement of his accounts as executor or administrator, whether any portion, and, if any, how much of the estate shall be reserved to meet such liability. If the claim be not presented under the notice, the executor or administrator proceeds with the payment of the debts, and the discharge and payment of legacies and distributive shares without reference to such claim, and when a liability actually accrues thereon, the holder has his remedy only against assets remaining in the hands of the executor or administrator at the time of the commencement of a suit for the same, or against assets *in futuro*, or against the next of kin, or legatees of the deceased. Indeed, it may be stated, generally, that the executor or administrator, proceeding in due course of administration, is, to all intents and purposes, discharged of liability for all claims against the deceased, except those presented under the notice duly published for the exhibition of claims. And the holder of claims, whether actually due or contingent,

(mm) See *Doan v. Hines' Admrs.*, 22 Wend. 640.

(i) See *Wms. on Exrs.* 885.

not so presented, has his remedy, in the main only, against the legatees or distributees of the decedent.

The other clauses of the above sections, numbered 39 and 40, providing for the prosecution of suits on demands not presented under the notice, and declaring the liability of the executor or administrator for assets and for costs in such suits, do not, consistently with the plan and purposes of this work, furnish subjects for any further remarks. And the same may be said of the 42d section, declaring the liability of the next of kin and legatees of the deceased, for claims so unrepresented. The 41st section, declaring the rule as to costs in suits against executors and administrators, will hereafter be more particularly considered in connection with the subject of costs generally.(n)

Of the Adjustment and Retainer of Debts due by the Deceased to the Executor or Administrator.

Previous to the Revised Statutes, as an executor or administrator, among creditors of equal degrees, might pay one in preference to another, so it was another of his privileges that he had a right to retain for his own debt due to him from the deceased, in preference to all other creditors of equal degree.(o)

The Revised Statutes having abolished all preferences in the payment of the debts of deceased persons, except in respect to debts due the United States, taxes and judgments, also deprived the executor or administrator of this privilege. The following is the provision of the Revised Statutes on this subject:

Sec. 33. No part of the property of the deceased shall be retained by an executor or administrator in satisfaction of his own debt or claim, until it shall have been proved to, and allowed by the surrogate; and such debt or claim shall not be entitled to any preference over others of the same class.(oo)

The following section of the law of 1837, makes provision in relation to the proof in these cases.

Sec. 37. The proof of the debt or claim of any executor or administrator required by the above 33d section, may be made on the service and return of a citation for that purpose, directed to the proper persons, or on the final account of any such executor or administrator, pursuant to the third article of the third title of chapter six of the second part of the Revised Statutes.(p)

The revisers, in their note to the above 33d section of the Revised Statutes, say: "An early exhibition of the administrator's claims will tend to an adjustment of the estate; its allowance by the surrogate will enable other creditors to know its extent."(q) But executors or administrators seldom take proceedings for the proof and allowance of

(n) *Post*, chap. 15.

(o) *Woodward v. Lord Darcy*, Plowd. 184; *Dyer*, 2 a, in marg., as to an executor; and *Warner v. Wainford*, Hob. 127; *Bond v. Green*, 1 Brownl. 75; *S. C.*, Godb. 217, pl. 310, as to an administrator; *Wms. on Exrs.* 894.

(oo) 2 R. S. 88; 4th ed. 274.

(p) 2 R. S. 90; 4th ed. 274.

(q) 3 R. and or. S. (2d ed.) App. 642.

their own claims, until they come before the surrogate on a final accounting.

The Statute of Limitations, however, will run against a claim of an executor or administrator, against the estate of the decedent, the same as against the claim of any other person.^(r) In order to save the statute, therefore, it may be necessary for the executor or administrator to take proceedings for the proof of his claim at an earlier stage of the administration, and the 37th section of the law of 1837, above quoted, provides the requisite facilities for the purpose.

By that section, if the executor or administrator purpose to prove his debt or claim before the final accounting, he must take out a citation for that purpose, to be directed to the proper persons. The language of the section is vague, and it is difficult to determine upon any precise course of practice under it. The proper persons to whom the citation is to be directed, must be all persons interested in the estate. Neither the number of days' service of the citation which must be given, nor the manner of the service is prescribed. It is presumed that if it should appear that any of the proper persons reside out of this state, that would be a great obstacle in the way of proceedings under the section to prove a claim.

If the executor or administrator deem it advisable to apply separately for the proof of his alleged claim, he should present a written petition to the surrogate, stating the amount and circumstances of the claim proposed to be proved, and the correctness of the same, the names of all persons interested in the estate, their residences, and if any of them be minors, that fact; and whether such minors have or have not general guardians, and the name and residence of the general guardian of any minor, and praying a citation pursuant to this section. The surrogate will give the necessary directions relative to the service of the citation. They should be included in the order for issuing the same. (For forms of the application, order and citation, see Appendix, No. 56.) Before taking any testimony in the matter, the surrogate will require evidence of the due service of the citation on all the parties in interest. On the day named in the citation for the proof, on such evidence being produced, an examination respecting the claim may be gone into, and the same may thereupon be adjusted and allowed.

The occasion of the final settlement of the executor's or administrator's account, when all the parties are before the surrogate, is the time best adapted for this investigation relative to the executor's or administrator's debt or claim, and, as has been stated, it is usually deferred to that period. If there be a deficiency of assets to pay the debts, or any difficulty in the distribution, the executor or administrator will refuse to pay final dividends until on a decree of the surrogate after a settlement of his accounts. He will ascertain and pay dividends or legacies, or distributive shares, before such settlement, with reference to a proper amount to meet his own claim to be allowed on its adjustment, and can in few instances suffer any prejudice by the delay, nor can any other party be injured by such postponement of the proof and allowance of his debt. This subject will, of course, be again adverted

^(r) *Treat v. Fortune*, 2 Bradf. Surr. Rep. 116.

to in connection with the settlement of the executor's or administrator's account, and the reader is referred to that portion of this work where such settlement is treated of, for further particulars respecting the proof and allowance of the executor's or administrator's claim.^(s)

CHAPTER XI.

OF LEGACIES AND THE PAYMENT AND DISCHARGE THEREOF; OF ENFORCING THE PAYMENT OF LEGACIES, AND OF DISTRIBUTION IN CASES OF INTESTACY.

HAVING thus considered the office of an executor or administrator, in regard to the payment of debts according to the order prescribed by law, it now becomes necessary to treat of the duties which next demand his attention, viz., those which respect the payment of legacies.

A legacy is defined to be "some particular thing or things given or left, either by a testator in his testament, wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil or last will, wherein no executor is appointed, to be paid or performed by an administrator."^(a)

The duties and liabilities of an administrator with the will annexed, are therefore the same as those of an executor, in respect to legacies. Indeed, by statute,^(b) it is expressly provided that "In all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators with such will, shall have the rights and powers, and be subject to the same duties, as if they had been named executors in such will."

In treating, then, of the subject of legacies, whatever may be said of executors, applies to administrators with the will annexed also.

Who is capable of being a Legatee.

By statute,^(c) as has already appeared, "If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment, shall be void, so far only as concerns such witness, or any claiming under him." "But," by the next section, "if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be

(s) See *post*, chap. 12.

(a) Godolph, pt. 3, ch. 1, sec. 1; Wms. on Exrs. 905.

(b) 2 R. S. 72, sec. 22. See *ante*, p. 230; 4th ed. 258.

(c) 2 R. S. 65, sec. 50; *Ante*, p. 153.

saved to him, as will not exceed the value of the devise or bequest made to him in the will." This seems to be the only distinct statutory provision disabling any person from being a legatee.

The case of *Caw agt. Robertson*, (d) was a decision upon this statute. In that case there were three subscribing witnesses, all of whom had legacies by the will. The surrogate, very properly it was considered, called the witnesses in the order in which their names were subscribed. The proof of the will was not contested, and the first two witnesses having testified to all the facts and circumstances requisite to the establishment of the will, the third was then sworn only "to testify as to the questions which should be put to him by the surrogate, touching the circumstances of the executing the said will, and how his name came to be attached to said will as a witness." His answers to the questions put after having been thus sworn, were not such as to tend to the proof of the will, and the surrogate did not regard him as an attesting witness, and decided that he need not be sworn as such, and the certificate of the surrogate stated that the will was proved by the oaths of the other two witnesses. The will was admitted to probate by the surrogate, and the third witness claimed his legacy. The Court of Appeals after—adverting to the former provisions of the Revised Statutes relative to the number of witnesses requisite to be examined for the proof of the will, and after considering the tenth and eleventh sections of the law of 1837, providing that "two at least of the witnesses to such will, if so many are living in this state, and of sound mind, and are not disabled from age, sickness or infirmity, from attending shall be produced and examined;" and that "in case the proof of any such will is contested, and any person having the right to contest the same shall, before probate made, file with the surrogate a request in writing that all the witnesses to such will shall be examined"—determined, that under these provisions of the statute, there is not any necessity for examining more than two witnesses who satisfactorily prove the will, unless the proof is contested by some one having the right to do so, and that as the proof of the will in question was not contested, and as the evidence of the first two witnesses furnished the requisite satisfactory proof of the will, and the time for appealing from the surrogate's decree establishing the will had expired, the person whose name was subscribed to the will as the third attesting witness, was entitled to the legacy bequeathed to him by the will.

It is laid down in the English books that an alien friend may be a legatee of personal chattels; but any legacy to an alien enemy will be forfeited to the king. (e)

It may be observed, that although a man cannot make a grant to his wife, nor enter into a covenant with her, (for such a grant would be to suppose her separate existence, and to covenant with her would be to covenant with himself;) yet he may bequeath anything to her by will: since that cannot take effect till after the coverture is determined by death. (f)

(d) 1 Seld. 125.

(e) Wms. 906.

(f) 1 Black. Comm. 442; Co. Litt. 112; Wms. on Exrs. 908. The third section of the

Of Bequests to Charitable Uses.

In England it is said all bequests to *superstitious* uses are illegal and void, but bequests to *charitable* uses are not only legal and valid, but are, in some measure, favored in our law, provided that they are of personal property in no way connected with land. (ff)

With respect to bequests to charitable uses, by the law of England, testamentary dispositions to charitable or public purposes, of money or other personal estate, not connected with real property, are valid. But with regard to bequests of land, or affecting land, it is enacted by the Statute of Mortmain, 9 Geo. II, ch. 36, "That from and after the 24th June, 1736, no manors, lands, tenements, rents, advowsons or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, &c., of any such lands, &c., (other than stocks in the public funds,) be and be made by deed, indented, sealed and delivered, in the presence of two or more credible witnesses, twelve calendar months, at least, before the death of such donor or grantor, including the days of the execution and death, and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months, at least, before the death of such donor or grantor, including the days of the transfer and death, and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be, without any power or revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him." The second section provides that such limitations, &c., shall not be construed to extend to any purchase or transfer made for valuable consideration. The third section then enacts, "That all gifts, grants, conveyances, appointments, assurances, transfers and settlements

act "for the more effectual protection of the property of married women," as amended, (S. L. 1848, 308; 1849, 528; 2 R. S 4th ed. 331,) provides that "any married female may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner, and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." By the strict legal as well as grammatical construction of this language, a married woman is prevented from taking from her husband by devise or bequest, as well as by gift or grant. But the case is like that stated in the text, when the devise or bequest from her husband takes effect, if the expression may be allowed, she is not a married female—the person from whom she takes the devise or bequest is not her husband.

(ff) Wms. 908.

whatsoever, of any lands, tenements or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting, or to affect, any lands, &c., &c., to or in trust for any charitable uses whatsoever, which shall, at any time, from and after, &c., be made in any other manner or form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void."

The uses and purposes which the law deems charitable so as to be subject to the restriction of the statute, are pointed out by the statute commonly known as the Statute of Charitable Uses, 43 Eliz. ch. 4. That statute after reciting that lands, goods, money, &c., had been given, &c., heretofore, to certain purposes, (which it enumerates in detail,) which lands, &c., had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trust and negligence, in those that should pay, deliver and employ the same, proceeds to enact, that it shall be lawful for the Lord Chancellor, &c., to award commissions under the great seal to proper persons, to inquire by juries of all and singular such gifts, &c., breaches of trusts, &c., in respect to such gifts, &c., heretofore given, &c., or which shall hereafter be given, &c., to or for any, the charitable and godly uses before rehearsed: and upon such inquiry to set down such orders, judgments and decrees, as the lands, &c., may be duly and faithfully employed to, and for such charitable uses before rehearsed, for which they were given; which orders, judgments and decrees, not being contrary to the orders, statutes or decrees of the donors and founders, shall stand firm and good, according to the tenor and purpose thereof, and shall be executed accordingly, until the same shall be undone and altered by the Lord Chancellor, &c., upon complaint by any party grieved to be made to them." The statute further provides for certain excepted cases, and for the enforcement of the judgments and orders of the commissioners, and also for certain proceedings before the Lord Chancellor, in the nature of an appeal by a party deeming himself aggrieved from the judgments of the commissioners.

In this statute, gifts for relief of aged, impotent and poor people, for maintenance of sick and maimed soldiers and mariners, for ease of poor inhabitants concerning payment of taxes, for aid of young tradesmen, handicraftsmen, and persons decayed, for relief, stock and maintenance of houses of correction, for marriages of poor maids for education and preferment of orphans, for schools of learning, free schools, and scholars in universities, for relief or redemption of prisoners or captives, for repair of bridges, ports, havens, causeways, churches, sea banks and highways, are enumerated as charitable uses. Bequests to any of the purposes specified in the last mentioned statute, or to any purpose of a similar nature,^(g) are considered as bequests to charitable uses, within the Statute of Mortmain, 9 Geo. II, ch. 36.

The question as to the validity of bequests to charitable uses, aside from any objection on the ground of a perpetuity or the illegality of the trust, arises, in most cases, out of the uncertainty or indefiniteness which must, from the nature of the object or supposed object in view, neces-

(g) See *Turner v. Ogden*, 1 Cox. 317.

sarily exist as to the persons intended to be benefited by the testator's bounty: And unless there is an authority provided for ascertaining the beneficiaries intended, and enforcing the application of the bounty to the purposes and in the manner directed by the testator, such bequests must be inoperative and void. The terms used in indicating the persons intended to be benefited by the legacy usually are general, and describe a class or number of individuals in some particular condition. A bequest for the benefit of the "poor of a certain town" refers "to a class of persons to come into existence from time to time, not by inheritance, or any order of succession defined by law, but who are ascertained only by their answering the description mentioned. Such a line of succession, not being known or recognized by the ordinary rules of law, cannot be made the channel for the perpetual transmission of the legal or beneficial ownership of property, unless by force of that peculiar system of law, known in England under the name of the law of charitable uses."

According to the law of England, as understood at the time of the American Revolution, and as it exists at this day, conveyances, devises and bequests for the support of charity or religion, though defective for the want of such a grantee or donee as the rules of law require in other cases, would (when not within the purview of the mortmain act) be supported and established in the Court of Chancery.^(h) In the numerous discussions upon charitable gifts which have taken place in the courts of the United States, it has been uniformly assumed that the English doctrine, to the effect above stated, was well settled in that country, and was constantly acted upon there, while this state was an English colony.⁽ⁱ⁾ By the 17th section of the first article of the constitution of this state, such parts of the common law and of the acts of the Legislature of the colony of New York, as, together, did form the law of the said colony on the nineteenth day of April, one thousand seven hundred and seventy-five, and which have not since expired or been repealed or altered, are and continue the law of this state, subject to such alterations as the Legislature may make concerning the same. But all such parts of the common law, and such of the said acts, and others, or parts thereof, as are repugnant to the constitution, are derogated.^(j)

Having adopted the common law of England so far as it was applicable to our circumstances and conformable to our institutions, the law of charitable uses, says Mr. Justice Denio, in *Williams v. Williams*,^(k) is in force here, unless, *first*, it was established by an English statute which has been abrogated; or, *secondly*, unless there is something in the system repugnant to our form of government; or, *thirdly*, unless it can be shown by the history of our colonial jurisprudence that it was not in

(h) Case of *Christ's College, Cambridge*, 1 Wm. Blackstone's Rep. 90; *Moggridge v. Thackwell*, 7 Ves. 36.

(i) *Baptist Association v. Hart*, 4 Wheat. 1; *Inglis v. The Sailors' Snug Harbor*, 3 Peters, 99; *Orphan Asylum v. McCarty*, 9 Cow. 437; *Going v. Emery*, 16 Pick. 107; *Vidal v. Girard's Executors*, 2 Howard, 127; *Dutch Church in Garden Street v. Mott*, 7 Paige, 77; *Executors of Burr v. Smith*, 7 Verm. 241.

(j) Const. 1846, art. 1, sec. 17; Const. 1820, art. 7, sec. 13; Const. 1777, art. 35.

(k) Not yet reported. Decided December, 1853

force here prior to the Revolution; or, *lastly*, unless it has been abolished by the Revised Statutes.^(l)

By the act for the amendment* of the law and the better advancement of justice, passed 27th February, 1788,^(m) the Statute of Charitable Uses, 43 Elizabeth, ch. 4, and also the Statute of Mortmain, 9 Geo. II, ch. 36, were repealed. If the law of charitable uses originated in and was created by the Statute of Elizabeth, that law, since the repealing act of 1788, ceased to have force or existence in this state, and such has been the position contended for in the cases by those resisting an alleged charitable donation. This question was fully examined by Mr. Justice Denio, in the case mentioned, of *Williams v. Williams*, and the conclusion arrived at by him was, "that the law of charities was, at an indefinite but early period of English history, engrafted upon the common law; that its general maxims were derived from the civil law, as modified in the later periods of the empire by the ecclesiastical element introduced with Christianity; and that the Statute of Charitable Uses was not introductory of any new principles, but was only a new and less dilatory and expensive method of establishing charitable donations, which were understood to be valid by the laws antecedently in force." And the learned justice further considered, that the repeal of the English Statute of Charitable Uses has no just influence upon the law of charities here, and that there is nothing in the situation or circumstances of this country, or in our form of government, which renders the general principles of the law of charity, as understood in England, inapplicable to us."

The English Court of Chancery continually refers to the Statute of Elizabeth, to ascertain whether the trust is such an one as it ought to execute. This enumeration is taken as a safe general guide, and such gifts as fall within the description, and such others as bear an analogy to them, are held to be valid. "In this country," says Mr. Justice Denio, "the question whether a gift to a particular purpose is a valid charitable gift, is to be resolved by a reference to the determinations of the English Court of Chancery, whether that court reposed itself upon the parliamentary definition, or arrived at its judgments in any other manner." "I do not think it was ever said by any English judge, that the proceeding in charity cases, by information, was authorized by, or founded upon the statute. I concede that the English doctrine is in force here, only so far as it is adapted to our political condition. In that class of cases, therefore, where the gift is so indefinite that it cannot be executed by the court, and where the purpose is illegal and impossible, the claim of the representatives of the donor must prevail over the charity. The reason is, that we have no magistrate clothed with

(l) Kent's Commentaries, 472, 473, and note (a) to 5th ed.; *Bogardus v. Trinity Church*, 4 Paige, 198; *Canal Commissioners v. The People*, 6 Wend. 445; *Boehm v. Engle*, 1 Dall. 15; *Attorney-General v. Stewart*, 2 Merivale, 162; *Ayres v. The Methodist Church, &c.*, 3 Sandf. Sup. Ct. R. 368.

(m) Chap. XLVI. An act for the amendment of the law, and the better advancement of justice, passed 27th February, 1788. The repealing section of this statute is as follows:

XXXVII. And be it further enacted by the authority aforesaid, That from and after the first day of May next, none of the statutes of *England*, or of *Great Britain*, shall operate or be considered as laws of this state. 2 Jones & Varick, 269, 282; See 1 R. L. 1813, 526, sec. 30; 2 R. S. 779; 4th ed. 976, sec. 3.

the prerogatives of the crown, and our courts of justice are entrusted only with judicial authority. Where the gift is capable of being executed by a judicial decree, I know of no reason why the court should refuse to execute it. It is unnecessary to decide in this case whether we could proceed upon the notion of *approximation*, where it is impossible to execute the gift substantially according to the grant or devise. My own opinion is, that the distribution of powers among the great departments of the government, which is a fundamental doctrine in the American systems, would forbid to the courts the exercise of a jurisdiction so purely discretionary."

The question whether the law of charitable uses was abrogated by the provisions of the Revised Statutes prohibiting perpetuities, is also examined by Justice Denio in the opinion of the court in *Williams v. Williams*.

The title of the Revised Statutes relative to the "accumulations of personal property and of expectant estates in such property," provides as follows:

Sec. 1. The absolute ownership of personal property shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives, in being at the date of the instrument containing such limitation or condition: or, if such instrument be a will, for not more than two lives, in being at the death of the testator.

Sec. 2. In all other respects, limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in the first chapter of this act in relation to future estates in lands.

Sec. 3. An accumulation of the interest of money, the produce of stock or other income, or profits arising from personal property, may be directed by any instrument sufficient in law to pass such personal property, as follows:

1. If the accumulation be directed to commence from the date of the instrument, or from the death of the person executing the same, such accumulation must be directed to be made for the benefit of one or more minors then in being, or in being at such death, and to terminate at the expiration of their minority.

2. If the accumulation be directed to commence at any period subsequent to the date of the instrument, or subsequent to the death of the person executing such instrument, it must be directed to commence within the time allowed in the first section of this title for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and must terminate at the expiration of their minority.

Sec. 4. All directions for the accumulation of the interest, income or profit of personal property, other than such as are herein allowed, shall be void; but a direction for an accumulation, in either of the cases specified in the last section, for a longer term than the minority of the persons intended to be benefited thereby, shall be void only as respects the time beyond such minority.⁽ⁿ⁾

These provisions, it was considered in the judgment referred to, do

(n) 1 R. S. 773-4; 4th ed., 2d vol. 183-4.

not apply to bequests for charitable purposes. "But in the absence of a corporation, I am of opinion," says Mr. Justice Denio in that case, "that charitable gifts, from their nature, are excepted from the law against perpetuities."

"The result of my examination of the case," the learned justice concludes, "is, that the law of charitable uses, as it existed in England at the time of the Revolution, and the jurisdiction of the Court of Chancery over these subjects, became the law of this state on the adoption of the constitution of 1777; that the law has not been repealed, and that the existing courts of this state having equity jurisdiction are bound to administer that law."

In the case in question, the provision in the will of the testator was as follows: With a desire to raise the standard of intellectual and moral improvement among the poor, I constitute and appoint Zophar B. Oakley, John Wood and Charles Sturges, of the village of Huntington, and their successors, to be appointed in the manner hereinafter authorized, a board of trustees of a fund which I hereby constitute for the exclusive education of the children of the poor; and in order to maintain the number of the said trustees in perpetuity, I hereby authorize the surviving or remaining trustees to fill up any vacancy as often as it shall occur by death, resignation, or removal from the village of any of the said trustees, by the choice of another, to be entered upon the minutes of their proceedings. I give and bequeath to the above named trustees and their successors, appointed as aforesaid, the sum of six thousand dollars, in trust, for a perpetual fund for the education of the children of the poor, who shall be educated in the academy in the village of Huntington; or, in case of the destruction of the academy by fire or otherwise, then in the school next west of the academy until it shall be rebuilt. No part of this fund ever to be appropriated to the erection or repair of buildings. It is my will that this fund shall be managed in manner following, to wit: The principal to be loaned on bond, secured by mortgage of lands of twice the value of the sum loaned, and one-half of the interest annually accruing to be added to the principal until the whole fund amounts to the sum of ten thousand dollars. The other half of the interest to be appropriated and expended in the education of the children of the poor; and when the said fund, by the addition of the interest as aforesaid, shall amount to the said sum of ten thousand dollars, then it is my will that the whole interest of the said fund shall be annually appropriated and expended in the education of the children of the poor in the academy in the village of Huntington," and the Court of Appeals, overruling a judgment of the Supreme Court, declared the bequest valid and effectual.

The law relative to bequests to religious corporations, was also a subject of discussion in the same case. At common law a corporation could always take a bequest of such personal property as it could lawfully acquire by any other mode of purchase.^(o) By the fourth section of the act "To provide for the incorporation of religious societies,"^(p) the trustees of every church congregation or society, are authorized

(o) Angel and Ames on Corp. p. 111, sec. 6; *In the Matter of Hows*, 1 Paige, 214; *McCarty v. Orphan Asylum Soc.*, 9 Cow. 437.

(p) Passed April 5, 1813, sess. 36, chap. 60, 1 R. S. (4th ed.,) 1179-81.

and empowered to take into their possession and custody all the temporalities belonging to such church, congregation or society, whether the same consist of real or personal estate, and whether the same shall have been given, granted or devised directly to such church, congregation or society, or to any other person for their use; and also by their corporate name or title to sue and be sued in all courts of law or equity, and to recover, hold and enjoy all the debts, demands, rights and privileges, and all churches, meeting-houses, parsonages and burying places, with the appurtenances, and all estates belonging to such church, congregation or society, in whatsoever manner the same may have been acquired, or in whose name soever the same may be held, as fully and amply as if the right or title thereto had originally been vested in the said trustees; and also to purchase and hold other real and personal estate, and to demise, lease and improve the same for the use of such church, congregation or society, or other pious uses, so as the whole real and personal estate of any such church congregation or society, with the exception of three churches in the city of New York, and one in the city of Albany, shall not exceed the annual value or income of three thousand dollars. Whatever may be the construction of the terms "other pious uses," contained in this section, the right of a religious corporation to take and hold property, it was considered by Mr. Justice Denio, clearly extends to such as may be necessary within the specified limit, for the purposes of the church, congregation or society, and he approves the doctrine of the Chancellor, *In the Matter of How*,^(q) that a testator has a right to limit his bounty to a church, to a part of the objects to which the corporation may appropriate its general funds.

The provisions of the Revised Statutes which have been above quoted, relative to the accumulations of personal property, &c., prohibiting perpetuities of personal estate, do not, it is held in the opinion of Mr. Justice Denio, in the case thus so often referred to, apply to bequests for the benefit of religious corporations organized under the statute. Such corporations were, before the Revised Statutes, authorized to hold real and personal estate in perpetuity, contrary to the general principle of law, and that power was not taken away by the Revised Code. The object of this class of corporations being to perpetuate the uses of the property acquired by them, it necessarily follows that it is legal for a donor to prescribe by way of limitation or condition, that his particular gift shall be kept and preserved so as to subserve the purposes which the corporation was created to promote, and that it shall not be wasted, alienated, or otherwise misappropriated. It is no more than to declare that the property shall be devoted to the objects which the Legislature had in view, in providing for the corporate existence of the grantee. "In my judgment," says the learned justice, in the same opinion already quoted at so great a length, "the provisions of the Revised Statutes respecting trusts, perpetuities and the limitation of future estates, were devised to restrain the natural propensity of mankind to perpetuate their estates in their families and among the descendants of themselves, and their relatives and friends; a propensity

(q) 1 Paige R. 214.

which the laws of the mother country have allowed, to an extent which could not be tolerated in a purely representative government, where a degree of equality in social condition is indispensable. I think these provisions were not designed to, and do not at all affect conveyances or testamentary gifts to religious or charitable institutions."

In the case in question the bequest was as follows:—"I give and bequeath the trustees of the Presbyterian church and congregation in the village of Huntington, and their successors, in trust for the support of a minister of the said church, as now constituted, the sum of six thousand dollars, to be managed in manner following, to wit: the principal to be loaned on good landed security of twice the value of the sum loaned, and one-half of the interest annually accruing to be annually applied to the support of the gospel minister in said church, as now constituted." It was provided that a pew, free of rent in the church, should be reserved for the use of that part of the testator's family which might reside in Huntington. No part of the fund was to be applied to building or repairing the church; and any diversion of the fund from the purposes for which it was given, was to operate as a forfeiture in favor of his residuary legatee.

With respect to this particular bequest it was held, that assuming that the provision in the title of the Revised Statutes, above recited,^(r) forbidding accumulations of the interest of money or the income of personal property, except for the benefit of and during the minority of children, applied to the bequest under consideration, still this did not render the legacy wholly void.^(s) A will may be void as to part, for some illegality or violation of law, and valid as to the residue. The language of the fourth section is, that *all directions* for the accumulation of the interest, income or profits of personal property, other than such as are herein allowed, shall be void." "It is the *direction* only," says the learned justice, "which is void. Being void it would seem that it should be stricken out of the will; and if that were done in this case, the legacy and the general purposes for which it was given would remain. The six thousand dollars is not given for the purpose of accumulation, but 'for the support of a minister of the said church.' The direction for accumulation is among the provisions touching the management of it. As it is found to be illegal to manage it in the way indicated in all respects, it is still to be loaned in the manner directed, and the whole income is to be applied according to the general purpose pointed out. If the direction for accumulation required, or would occasion an illegal suspension of the absolute ownership, the whole provision might be void; but having determined that there is nothing illegal in the duration of the estate, what is said respecting accumulation is simply a direction which the testator had no right to give, and which, according to the mandate of the statute, is to be held void."

"The statute," continues the learned justice, "makes it the duty of the courts to carry into effect the intention of the testator, so far as it is consistent with the rules of law. It is clear that he intended to give the \$6,000 to the church, for he says so in so many words, and although

(r) *Ante*, p. 366; 1 R. S. 773-4; 4th ed. (2d vol.) 183-4.

(s) *Kane v. Gott*, 24 Wend. 641, 665.

he also intended the church should accumulate a part of the interest for a time, for its own benefit, we have no warrant for saying that he would have withheld the gift had he known that the direction to accumulate was illegal. In *Slade v. Holford*(*t*) a direction for accumulation in a will was held void; but the devisee whose estate was made subject to the direction to accumulate, was held to take it absolutely.(*u*) It seems to be settled in the Superior Court, that where there is an authorized trust connected with an illegal direction for accumulation, the party for whose benefit the accumulation was directed is entitled to the current income, as though nothing had been said respecting accumulation.(*v*) In *De Kay v. Irving*,(*w*) where there were successive trusts of land making together a limitation beyond the period allowed by the statute, it was held by the Court for the Correction of Errors, that the first part, which was for the life of a person in being, was valid and the residue only void. *Root v. Stuyvesant*,(*x*) was decided on the ground that the power given to the devisee for life, to make leases for sixty-three years, was so important a feature in the testator's scheme, as made it quite certain that he would have made a different disposition of the property had he known that such a power was illegal. This was determined by a divided vote, against the opinion of all the judges. Still it is a precedent for similar cases; but not for such an one as the present, where the part of the testamentary provision which is left, is quite consistent with the testator's general intention.

"Upon this part of the case, I am of opinion that the bequest to the church is valid, and that so much of the bill as relates to this legacy, should be dismissed."

In *Coggeshall v. Pelton*,(*y*) before Chancellor Kent, a legacy to the town of New Rochelle, for a particular purpose expressed in the will, it being a public charity, and the object declared, though there was no trustee named, yet the legacy was held to be valid; and the gift was carried into effect as a gift to a charitable use, in the exercise of the common law powers and jurisdiction of the court.

In *King v. Woodhull*,(*z*) the testatrix gave and bequeathed a residue, provided the same did not exceed one thousand dollars, "to the American Home Missionary Society, to be paid upon the receipt of the treasurer of the said society for the time being." The society was unincorporated, but the Vice-Chancellor, not without some misgivings, however, decreed the validity of the legacy. In *Wright and others v. Trustees of the Methodist Episcopal Church*,(*a*) one of the legatees of the residue was "the yearly meeting of Friends in New York," and was proven to be composed of members of the Society of Friends living in Vermont, New York, part of Massachusetts, and Upper Canada; it was held that the bequest was valid, and payment could be made to

(*t*) 1 Wm. Blackstone's R. 428.

(*u*) See 3d Burr. 1416, *S. C.* And see, also, *Thompson v. Thompson*, 1 Collier, 381, 400.

(*v*) *Lang v. Ropke*, 5 Sandf. S. C. R. 363, 391.

(*w*) 5 Denio, 646.

(*x*) 18 Wend. 257.

(*y*) 7 John Ch. R. 292.

(*z*) 3 Edw. Ch. R. 79.

(*a*) 1 Hoff. Ch. R. 205.

the treasurer or clerk in office at the time. And in *Banks v. Phelan*,^(b) the court considered the legality of bequests for pious and charitable uses, for the benefit of unincorporated societies, well established in this state, and decreed the payment of a legacy of three thousand dollars, "to the Roman Catholic church of Petersburg in the state of Virginia," an unincorporated society.^(c)

Of the General Rules of Construction of Wills.

It is obviously not within the scope of this work to enter fully into the general doctrine of the construction of wills. It may, however, be useful to state briefly some of the most important rules which have been established upon this subject.

1. Technical words are not necessary to give effect to any species of disposition.^(d) Therefore, where the testator used the words "all my personal estates," and it was clear, beyond all doubt, upon the face of the will, that the testator meant by these words, not what is technically understood by them, but the *real* property over which he had an absolute personal power of disposition, it was holden that the freehold passed by this description.^(e) So, on the other hand, if on the whole will it clearly appears that the testator's intention was to bequeath leasehold property, in which he had a chattel interest only, under the description of his *real* estate, such intention shall be carried into effect.^(f) Again, where technical terms are employed in a will, in such a manner, that to give them their strict meaning, would defeat the intention of the testator apparent from the will, a liberal or popular interpretation will be given them in order to carry into effect his intention. Thus, the term "*inherit*" will be held applicable to lands *devised* or *conveyed* by a parent or ancestor to a child or descendant.^(g)

2. Nevertheless, if technical words are used by the testator, he will be presumed to employ them in their legal sense, unless the context contain a clear indication to the contrary.^(h) "If words of art," said Lord Alvanley, in *Thelluson v. Woodford*,⁽ⁱ⁾ "are used, they are construed according to the technical sense, unless upon the whole will it is plain that the testator did not so intend." Courts, therefore, have no right or power to say that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law.^(j) But where the intention of the testator is plain, it will be

(b) 4 Barb. Sup. Ct. Rep. 80.

(c) See, also, *Potter v. Chapin*, 6 Paige, 639; *Hornbeck's Executors v. American Bible Society*, 2 Sandf. Ch. Rep. 133.

(d) By Lord Kenyon, in *Hay v. Coventry*, 3 T. R. 86.

(e) *Doe v. Tyfield*, 11 East, 246. See, also, *Roe v. Pattison*, 16 East, 221; *Doe v. Haslewood*, 6 A. & E. 167; *Doe v. Pratt*, 1b. 180; *Davenport v. Collman*, 7 M. & W. 481.

(f) *Hobson v. Blackburn*, 1 Mylne & K. 571; *Goodman v. Edwards*, 2 Mylne & K. 759. See, also, *Read v. Backhouse*, 2 Russ. & M. 546; *Doe v. Cranston*, 7 M. & W. 1. But see *Hall v. Fisher*, 1 Coll. 47; *Stone v. Greening*, 13 Sim. 390; *Parks v. Parks*, 9 Paige, 107.

(g) *De Kay v. Irving*, 5 Denio, 646.

(h) *Lane v. Lord Stanhope*, 6 T. R. 352, by Lord Kenyon; *Phillips v. Garth*, 3 Bro. C. C. 68, by Buller, J.; *Buck v. Norton*, 1 Bos. & Pull. 57, by Eyre, C. J.; *Jesson v. Wright*, 2 Bligh, 1; *Mouncey v. Blamire*, 4 Russ. Ch. C. 386, 387.

(i) 4 Ves. 329.

(j) By Buller, J., in *Hodgson v. Ambrose*, Dougl. 341. See, also, *Milnes v. Slater*, 8 Ves. 306.

allowed to control the legal operation of words, however technical.^(k)

The rule above stated has been carried so far, that, in some instances, the testator has been presumed to use words and forms of expression in the sense which they have acquired by decided cases, although such sense be different from their ordinary and natural meaning.^(l)

It may be useful in this place, to state the well known principle, that where there is a general intent, and a particular one, the particular is to be sacrificed to the general intent.^(m) Which doctrine, perhaps, when rightly understood, amounts to no more than an example of the rule now under consideration, viz.: that technical words, or words of known legal import, shall have their legal effect, unless, from subsequent inconsistent words, it is *very clear* that the testator meant otherwise.⁽ⁿ⁾ In the construction of wills, the testator must be presumed to have used words in their natural, ordinary or primary sense,^(o) unless some obvious inconvenience or incongruity would result from so construing them;^(p) or unless from the situation of the testator's family,^(q) or the context of the will, it appears that he must have intended to use them in some other or secondary sense;^(r) or where, by reference to extrinsic circumstances, which existed at the time of the making of the will, or which must necessarily exist in the event or at the time contemplated by him, the use of such words, in their ordinary or primary sense, would, under the provision of the will, in reference to which such words were used, be senseless, absurd or inoperative.^(s)

3. The construction of the will is to be made upon the entire instrument, and not merely upon disjointed parts of it; and consequently all its parts are to be construed with reference to each other.^(t)

Hence, general words in one part of a will may be restrained, in cases where it can be collected from any other part of the will, that the testator did not mean to use them in their general sense.^(u)

Hence, also, generally speaking, if the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense.^(v) This rule, however, it is said, does not preclude the court from putting a different construction upon the same

(k) *Vauchamp v. Bell*, Madd. & Geld. 343; 6 Cruise's Dig. 148, 3d. ed.

(l) *Baines v. Dixon*, 1 Ves. sen. 41; *Wilmot v. Wilmot*, 8 Ves. 10. But see *Crowder v. Stone*, 3 Russ. Chanc. Cas. 223.

(m) "*Robinson v. Robinson*, 1 Burr. 38; *S. C.*, 3 Bro. P. C. 180, Toml. edit.; *Doe v. Applein*, 4 T. R. 82; *Doe v. Smith*, 7 T. R. 531; *Doe v. Cooper*, 1 East, 229; *Pierson v. Vickers*, 6 East, 548; *Jesson v. Wright*, 2 Bligh, 49; *Doe v. Harvey*, 4 B. & C. 620." *Parks v. Parks*, 9 Paige, 107.

(n) By Lord Redesdale, in *Jesson v. Wright*, 2 Bligh, 56, 57. S. P.; *Doe v. Gallini*, 5 B. & Adol. 521; *Lees v. Mosley*, 1 Y. & Coll. 589. See, also, 2 Bligh, 1; 1 B. & Adol. 944; 2 Sim. 33; 1b. 274; 1 Younge & Jerv. 512; 9 Bligh, 238; 2 Russ. & M. 566; 1 Beav. 59; 1b. 100.

(o) *Matter of Hallett*, 8 Paige, 375.

(p) *Roosevelt v. Thurman*, 1 Johns. Ch. Rep. 220.

(q) *Hone v. Van Schaick*, 3 Barb. Ch. Rep. 488.

(r) *Hone v. Van Schaick*, 3 Coms. 538.

(s) *Cromer v. Pinckney*, 3 Barb. Ch. Rep. 466.

(t) *Turpine v. Forreynor*, 1 Buls. 101; *Mirril v. Nicholls*, 2 Bulst. 178; *Gittins v. Steele*, 1 Swanst. 28. A codicil is to be taken as a component part of the will. See *ante*, p. 4.

(u) *Strong v. Teatt*, 2 Burr. 912; *Doe v. Reade*, 8 T. R. 122; *Whitmore v. Trelawney*, 6 Ves. 130; *Crone v. Odell*, 1 Ball & Beat. 466; *S. C.*, 3 Dow. 61.

(v) *Whitmore v. Craven*, 2 Chan. Cas. 169; *Goodright v. Dunham*, Dougl. 268; *Dalzell v. Welsh*, 2 Sim. 319. But see *Winterton v. Crawford*, 1 Russ. & M. 407.

words, even though used only once in a will, when applied to different subject matters. In the case of *Atkinson v. Hutchinson*,^(w) Lord Talbot decided, that the words "without leaving any issue," must be intended to mean, without leaving issue at the time of the death of the first taker, and that it was not, therefore, in the nature of an estate tail. But, as to real estate, it appears to have been the settled law in England, long before the Revolution, that these words in a will implied an indefinite failure of issue, and, therefore, as to that part of the property, they created an estate tail, which, by the statute of this state, is turned into a fee simple.^(x) In *Forth v. Chapman*,^(y) where the testator devised real and personal estate to A., and if he should die and *leave no issue of his body* then to B.; Lord Macclesfield said, that it might be reasonable enough to take the same words as to the different estates of realty and personalty, in different senses, and as if repeated by two several clauses; and that the words, "leave no issue," as applied to the personal estate, should be taken to mean *leave no issue at the time of his death*, but as applied to the freehold, to mean an *indefinite failure of issue*; and this case has been considered as an authority in many subsequent instances for a different construction of the same words in a will as applied to different subjects.^(z) It is not easy to reconcile these different rules with the principles of common sense, or to furnish any valid reasons for supposing that the testator meant one thing when he used these words in reference to the real estate, and that he meant something different, when in the same sentence he used them in reference to his personal estate and chattels real. The Legislature has seen the absurdity of these different constructions of the same words in a will, when applied to real or personal estate, and has applied the proper remedy, and have restored the term, "dying without issue" to its natural and obvious meaning, by declaring that where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words "heirs" or "issue," shall be construed to mean heirs or issue living at the death of the person named as ancestor,^(a) and by providing in this respect, that limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in relation to future estates in lands.^(b)

It must be further observed, that where there is no connection by grammatical construction, or direct words of reference, or by the declaration of some common purpose, between distinct bequests in a will, the rule now under consideration will not justify the drawing in aid the special terms of one bequest to the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and, al-

(w) 3 Peere Wms. 258.

(x) 1 Peere Wms. 667.

(y) *Forth v. Chapman*, 1 Peere Wms. 667; 2 Ves. sen. 180; Ib. 616; Cowper, 410; 1 East, 229; Ib. 263; Comyns' Rep. 372.

(z) *Sheffield v. Lord Orrery*, 3 Atk. 288; *Lord Stafford v. Buckley*, 2 Ves. sen. 180; *Southby v. Stonehouse*, 2 Ves. sen. 616; *Doe v. Smith*, 5 M. & S. 131, 132; *Doe v. Ewart*, 7 A. & E. 636, 659. See, also, *Carter v. Bentall*, 2 Beav. 551; *Byng v. Lord Strafford*, 5 Beav. 554; *Head v. Randall*, 2 Y. & Coll. Ch. C. 231; *Buckle v. Fawcett*, 4 Hare, 536, 542.

(a) 1 R. S. 724, sec. 22; 4th ed. (2d vol.) 133.

(b) 1 R. S. 773, sec. 2; 4th ed. (2d vol.) 184. See *Rathbone v. Dyckman*, 3 Paige, 9-30.

though there is no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view.(c)

4. The court is bound to give effect to every word of the will, without change or rejection, provided an effect can be given to it, not inconsistent with the general intent of the whole will taken together.(d) Thus, if one devises land to A. B. in fee, and afterwards in the same will devises the same land to C. D. for life, both parts of the will shall stand; and in the construction of the law, the devise to C. D. shall be first.(e) But where it is impossible to form one consistent whole, the separate parts being *absolutely* irreconcilable, the latter will prevail.(f)

It must not, however, be understood, that because the testator uses, in one part of his will, words having a clear meaning in law, and in another part words inconsistent with the former, that the first words are to be cancelled or overthrown.(g) A contrary principle is now fully established in the doctrine already considered, that the general intent, although first expressed, shall overrule the particular.(h)

Where any part of a will is ambiguous, the whole will is to be considered for the purpose of ascertaining the intention of the testator in that particular part; but where the intention is clear and certain, and no repugnancy appears between the different parts of the will, no such aid is necessary or proper.(i)

5. The will must be most favorably and benignly expounded, to pursue, if possible, the intention of the testator.(j)

It is a cardinal rule in the construction of wills, that the intention of the testator is to govern, if consistent with the rules of law, and that intention is to be ascertained from the whole will taken together, and not from the language of any particular provision or clause thereof, when taken by itself;(k) or from an examination of the whole will, in connection with the situation of the testator's property and family at the time it was made;(l) and, for the purpose of construction, a will and

(c) *Right v. Compton*, 9 East, 267; *Chambers v. Brailsford*, 18 Ves. 368. But see *Love-day v. Hopkins*, Ambl. 273; *Gittins v. McDermott*, 2 M. & K. 69. See, also, *Spirit v. Bruce*, Cro. Car. 368; *Doe v. Wright*, 8 T. R. 64; *S. C.*, in C. P., *nomine Doe v. Child*, 1 New R. 335; *Doe v. Westley*, 4 Barn. & Cress. 667; *S. C.*, 7 Dow. & Ryl. 112. See further on this subject, *Right v. Sidebotham*, Dougl. 759; *Goodright v. Burron*, 11 East, 220; *Paice v. Archbp. of Canterbury*, 14 Ves. 361; *Fenny v. Ewestace*, 4 M. & S. 58; *Doe v. Pearse*, 1 Price, 353; *Crawford v. Trotter*, 4 Madd. 361; *Oldman v. Slater*, 3 Sim. 84; Wms. on Exrs. 929.

(d) *Gray v. Minnethorp*, 3 Ves. 105; *Constantine v. Constantine*, 6 Ves. 102; *Doe v. Rawd- ing*, 2 B. & A. 448.

(e) *Anon.*, Cro. Eliz. 9; *Doe v. Davies*, 4 M. & W. 599.

(f) *Constantine v. Constantine*, 6 Ves. 100; *Doe v. Biggs*, 2 Taunt. 109; *Sims v. Doughty*, 5 Ves. 243; *Wykham v. Wykham*, 18 Ves. 421; *Sherratt v. Bentley*, 2 Mylne & K. 149; *Morrill v. Sutton*, 1 Phill. Ch. C. 533. See, also, 4 Beav. 478; 5 Beav. 100; *Shipperdson v. Tower*, 1 V. & Coll. C. C. 441.

(g) By Lord Red esdale in *Jesson v. Wright*, 2 Bligh, 56.

(h) *Ante*, p. 372.

(i) *Jackson v. Sill*, 11 Johns. 201.

(j) Touchs. 434; 2 Black. Com. 381.

(k) *Bradhurst v. Bradhurst*, 1 Paige, 331; *Covenhoven v. Schwler*, 2 Paige, 120; *Rathbone v. Dyckman*, 3 Paige, 9; *Crosby v. Wendell*, 6 Paige, 548; *Hone v. Van Shaick*, 3 Barb. Ch. Rep. 488; *S. C.*, on appeal.

(l) *Irving v. De Kay*, 9 Paige, 521; *Wolfe v. Van Nostrand*, 2 Coms. 436.

codicil may be considered together, and construed as different parts of the same instrument.(m)

To effectuate, therefore, the clear intention, as apparent upon the whole will, words and limitations may be transposed,(n) supplied,(o) or rejected.(oo) But the rule is, that words in a will are not to be rejected, unless there cannot be any rational construction of the words as they stand.(p)

Words, however, in a will, which, if allowed to stand, would produce repugnant and inconsistent results, may be rejected.(q)

The clear, literal interpretation of words may be departed from, if they will bear another construction; and the strict grammatical sense may be neglected.(r)

Whether an adjective shall refer exclusively to the last preceding antecedent, or may refer also to one or more farther back, depends upon the intent of the testator.(s)

That which seems to be a contingency or condition, upon which a remainder is to vest in interest, will, in furtherance of the intention of the testator, be regarded as only an inaccuracy of expression, and as intended by the testator to denote the time when such remainder is to vest in possession.(t)

So, in order to advance the apparent intention of the testator, "or" may be construed "and,"(u) and *vice versa*,(w) in cases of legacies, as well as devises of real estate. So "if" may be construed "when" for the same purpose.(x)

But a mistake in a will cannot be corrected, or an omission supplied,

(m) *Hone v. Van Schaick*, 3 Barb. Ch. Rep. 488; *Wescott v. Cady*, 5 Johns. Ch. Rep. 334.

(n) *Green v. Hayman*, 2 Chanc. Cas. 10; *Spark v. Purnell*, Hob. 75; *East v. Cook*, 2 Ves. sen. 32; *Duke of Marlborough v. Godolphin*, 2 Ves. sen. 74; *Marshall v. Hopkins*, 15 East, 309; *Hudson v. Bryant*, 1 Coll. 681; *Rathbone v. Dyckman*, 3 Paige, 9; *Pond v. Bergh*, 10 Paige, 140; *Mason v. Jones*, 2 Barb. S. C. Rep. 229.

(o) *Doe v. Micklem*, 6 East, 486, 493, 494; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476; *Montague v. Nucella*, 1 Russ. Chan. Cas. 171, 172.

(oo) *Boon v. Cornforth*, 2 Ves. sen. 276; *Sims v. Doughty*, 5 Ves. 243; *Doe v. Stenlake*, 12 East, 515; *Smith v. Pybus*, 9 Ves. 564; *Jesson v. Wright*, 2 Bligh, 1; *Sherratt v. Bentley*, 2 Mylne & K. 149; *Robinson v. Waddelow*, 8 Sim. 134; *Mason v. Jones*, 2 Barb. Sup. Ct. Rep. 229; *Bradley v. Amidon*, 10 Paige, 235.

(p) By Lord Eldon, in *Chambers v. Brailsford*, 19 Ves. 654; *S. C.*, 2 Meriv. 25.

(q) *Mason v. Jones*, 2 Barb. Sup. Ct. Rep. 229.

(r) *Bradhurst v. Bradhurst*, 1 Paige, 331; *Rathbone v. Dyckman*, 3 Paige, 9.

(s) *Van Allen v. Mooers*, 5 Barb. Sup. Ct. Rep. 110.

(t) *Brown v. Cener*, L. Raym. Rep. 427; *S. C.*, 2 Show, 152; *Longford v. Cheeke*, 3 Lev. 125; *Crosby v. Wendell*, 6 Paige, 548-52.

(u) *Richardson v. Spragg*, 1 P. Wms. 434; *Eccard v. Brooke*, 2 Cox, 213; *Read v. Snell*, 1 Atk. 643; *Weddell v. Mundy*, 6 Ves. 341; *Horridge v. Ferguson*, 1 Jac. 583; *Thackeray v. Hampson*, 2 Sim. & Stu. 214; *Monkhouse v. Monkhouse*, 3 Sim. 126; *Miles v. Dyer*, 5 Sim. 435; *Grimshaw v. Pickup*, 9 Sim. 581; *White v. Supple*, 2 Dr. & W. 471; *Parkin v. Knight*, 15 Sim. 83. The construction of "and" for "or" was not allowed in *Longmore v. Broom*, 7 Ves. 124; *Newman v. Nightingale*, 1 Cox, 341; *Gillings v. McDermott*, 2 M. & K. 69.

(w) *Maberley v. Strobe*, 3 Ves. 460; *Bell v. Phyn*, 7 Ves. 459; *Stubbs v. Sargon*, 2 Keen, 255; 3 M. & Cr. 507; *White v. Supple*, 2 Dr. & W. 471; *Hetherington v. Oakman*, 2 K. & Coll. C. C. 299. "And" is never read "or" unless the context of the will favors it, and the general intention is thereby elucidated or promoted; *Armstrong v. Moran*, 1 Bradf. Surv. Rep. 314. This construction was refused in *Doe v. Cooke*, 7 East, 269; *Doe v. Rawding*, 2 B. & A. 441; *Girdlestone v. Doe*, 2 Sim. 225.

(x) *Smart v. Clark*, 3 Russ. Chanc. Cas. 365. But see *Barileman v. Murchison*, 2 Russ. & M. 136.

unless it clearly appears by fair inference from the whole will.(y) Hence, not only in cases of devises of real estate, but also of wills of personal property, courts of construction cannot, in their interpretation of the intention of the testator, pay the least regard to any variance between the will as it stands, and the instructions given for preparing it.(z) If, in point of fact, there are any undue omissions or insertions in a will of personalty, these may, under certain circumstances, be reformed by application to the Court of Probate.(a)

But parol evidence is inadmissible to supply or contradict, enlarge or vary the words of a will, or to explain the intention of the testator, except there be a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described, or to rebut a resulting trust.(b) A will may, however, be construed in connection with another instrument in writing to which it refers.(c)

Again, an express bequest cannot be controlled by the reason assigned: The assigned reason may aid in the construction of doubtful words, but cannot warrant the rejection of words that are clear.(d) Nor can an express disposition be varied by inference or argument from other parts of the will.(e) Much less shall the obvious construction of a will be controlled by the inconvenient or unmeritorious nature of the bequest.(f) On the contrary, the court is bound to correct every inaccuracy and impropriety of terms in advancement of the *manifest* intention of the testator, however undeserving it may be of favor in a court of justice.(g) Where, indeed, the literal force of expressions differs in a will, it is a true rule to seek for the intention of the testator rather in a consistent and rational purpose, than in a purpose inconsistent and irrational.(h)

6. Where words are capable of a two-fold construction, the rule is, even in the case of a deed, and much more in the case of a will, to adopt such as tends to make it good.(i)

If two parts of a will are irreconcilable with each other, the last part is to be taken as evidence of a subsequent intention, and will prevail, unless other parts of the will forbid it.(j)

7. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but is to work as far as it can.(k)

Where a will contains different trusts, some of which are valid, and

(y) *Phillips v. Chamberlayne*, 4 Ves. 57; *Dent v. Pepys*, Madd. & Geld. 351.

(z) *Murray v. Jones*, 2 V. & B. 318. See further on this point, as to wills of realty, *Newburgh v. Newburgh*, 5 Madd. 364; *Powell v. Mouchett*, Madd. & Geld. 216.

(a) See *ante*, p. 169.

(b) *Mann v. Mann*, 1 Johns. Ch. Rep. 231.

(c) *Jackson v. Babcock*, 12 Johns. 389.

(d) *Cole v. Wade*, 16 Ves. 46.

(e) *Collett v. Lawrence*, 1 Ves. jun. 269; *Jones v. Colbeck*, 8 Ves. 42.

(f) *Thelluson v. Woodford*, 4 Ves. 329; *Smith v. Streatfield*, 1 Meriv. 358; *Deffis v. Goldschmidt*, 1 Meriv. 419.

(g) *Thelluson v. Woodford*, 4 Ves. 311, by Lawrence, J.

(h) *Jenkins v. Herries*, 4 Madd. 67.

(i) By Lord Talbot, in *Atkinson v. Hutchinson*, 3 P. Wms. 260; by Lawrence, J., in *Thelluson v. Woodford*, 4 Ves. 312; *Pond v. Bergh*, 10 Paige, 140; *Buller v. Buller*, 3 Barb. Ch. 304; *Mason v. Jones*, 2 Barb. Sup. Ct. Rep. 229.

(j) *Bradstreet v. Clark*, 12 Wend. 602; *Covenhoven v. Shuler*, 2 Paige, 122; *Gardner v. Gardner*, 6 Paige, 455; *Parks v. Parks*, 9 Paige, 107.

(k) *Thelluson v. Woodford*, 4 Ves. 328, by Buller, J.

others void or unauthorized by law; or where there are distinct and independent provisions as to different portions of the testator's property, or different estates or interests in the same portions of the property are created, some of which provisions, estates, or interests are valid, and others are invalid, the valid trusts, provisions, estates or interests created by the will of the testator, will be preserved, unless those which are valid and those which are invalid, are so dependent upon each other that they cannot be separated without defeating the general intent of the testator.^(l)

But if valid and invalid provisions are so intermingled that they cannot be separated from each other, they must all fall together. And where a particular provision, which, if it stood alone, would be valid, forms a part of, or depends upon a general purpose of the testator, which is contrary to law, it is void.^(m) Again, if the intention of the testator is illegal, or incapable of being carried into effect, the court cannot frame and decree a new legal intention, as near as practicable to his original intent.⁽ⁿ⁾

8. It is a settled rule, that in the construction of a will of personalty made by a testator domiciled in a foreign country, the *lex domicilii* must prevail, unless there is sufficient on the face of the will to show a different intention.^(o)

Modes of Description of a Legatee.

The present purpose is to consider briefly what persons are entitled to legacies under particular modes of description.

In general, no rule is better settled, than that legatees must answer the description and character given of them in the will; but it will presently appear, from the cases, that there are many important exceptions to it.

Who are entitled under the description of 1. "Children." 2. "Grandchildren." 3. "Wife." 4. "Nephews and Nieces."

1. "Children." Generally speaking, every person who, at the time of the testator's death, falls within the described class of "children," will be entitled: But where it appears from express declaration, or clear inference upon the will, that the testator intended to confine his bequest to those only who answered the description at the date of the instrument, such intention must be carried into effect.^(p) A court of equity, however is always anxious to include all children in existence at the time of the death of the testator:^(q) and particularly, when he stands in the

(l) *Hazlin v. Corse*, 2 Barb. Ch. Rep. 506; *De Kay v. Irving*, 5 Denio, 646; *S. C.*, affirmed, 9 Paige. Ch. Rep. 521; *Parks v. Parks*, 9 Paige, 107; *Williams v. Williams*, in Court of Appeals, December, 1853. See, also, *Hawley v. James*, 5 Paige, 318; 16 Wend. 61; *Lorillard v. Coster*, 5 Paige, 172; 14 Wend. 265.

(m) *Hawley v. James*, 5 Paige, 318, 16 Wend. 61. See, also, *Lorillard v. Coster*, 5 Paige, 172; 14 Wend. 265; *Root v. Stuyvesant*, 18 Wend. 257; *Salmon v. Stuyvesant*, 16 Wend. 321; *Hone v. Van Schaick*, 20 Wend. 564.

(n) *Lorillard v. Coster*, 5 Paige, 172; 14 Wend. 265.

(o) Story's Conflict of Laws, secs. 479 a, 479 m, 490, 491. Vide 2 Roper on Leg. ch. 21, sec. 9, p. 1459, 2d Amer. ed., Phila., 1848.

(p) *Sherer v. Bishop*, 4 Bro. C. C. 55. See, also, *Cressly v. Clare*, Ambler 397; *Viner v. Francis*, 2 Cox, 191, 192.

(q) *Ringrose v. Bramham*, 2 Cox, 384.

relation of parent to the legatees, the court, presuming that he intended to do his duty in providing for all his children at his death, will lay hold of any general expression to give effect to this presumed intention, and will not permit such general expression to be narrowed by the context.(r)

The leading principle is, that where a bequest is immediate to "children" in a class, children in existence at the death of the testator, and these alone, are entitled (s) And it will make no difference that the bequest is to children "begotten or to be begotten." (t)

And a child in *ventre sa mere* at the death of the testator, is considered as in *esse* if it is afterwards born alive; and such child is equally entitled with those who were born in the lifetime of the testator.(u) Where, however, by the will of the testator, there is a postponement of the division of a legacy given to a class of individuals, until a period subsequent to his death, every one who answers the description, so as to come within that class at the time, which is fixed by the testator for the division, will be entitled to a share, although not in *esse* at the death of the testator, unless there is something in the will to show that the testator intended to limit his bounty to such of the class as would answer the description when the will took effect by his death.(v)

And where the language of the will indicates a present bequest of a fund which is to be distributed at a period subsequent to the death of the testator, those who are in *esse* at the time of his death will take vested interests in the fund, but subject to open and let in others who may come into being, so as to answer the description and belong to the class at the time appointed for the distribution. Where, however, a

(r) *Matchwick v. Cock*, 3 Ves. 609; *Freeman v. Taylor*, 15 Ves. 363; *Roberts v. Higman*, 1 Bro. C. C. 532, *in notis*; *Viner v. Francis*, 2 Bro. C. C. 658; *S. C.*, 2 Cox, 190; *Crone v. Odell*, 1 Ball & Beat. 459; *Davidson v. Dallas*, 14 Ves. 576; *Scott v. Harwood*, 5 Madd. 332; *De Witte v. De Witte*, 11 Sim. 41; *Crower v. Pinckney*, 3 B. C. 466; *Doe v. Clarke*, 2 H. Bl. 399; *Rawlins v. Rawlins*, 2 Cox, 425; *Trower v. Butts*, 1 Sim. & Stu. 181; *Sprackling v. Ranier*, 1 Dick. 344; *Storrs v. Benbow*, 2 M. & K. 46; *Buller v. Lowe*, 10 Sim. 317; *Gilmore v. Severn*, 1 Bro. C. C. 582, (recognized *per M. R.* in *Ringrose v. Bramham*, 2 Cox, 385); *Hoste v. Pratt*, 3 Ves. 730; *Hughes v. Hughes*, 14 Ves. 256; *S. C.*, 3 Bro. C. C. 352, 434; *Curtis v. Curtis*, Madd. & Geld. 14; *Balm v. Balm*, 3 Sim. 492; *Tilcomb v. Butler*, 3 Sim. 417; *Blease v. Burgh*, 2 Beav. 221; *Gardener v. James*, 6 Beav. 170; *Clarke v. Clarke*, 8 Sim. 59.

(s) *Wms. on Exrs.* 934; *Collin v. Collin*, 1 Barb. Ch. Rep. 630. Mr. Surrogate Bradford considers that the authorities favor the doctrine that, generally, in case of a bequest to children as a class, only those living at the date of the will are entitled, notwithstanding a provision in favor of issue in case of death, unless an intention to the contrary can be deduced from other clauses or phrases. *Lawrence v. Hebbard*, 1 Bradf. Sur. Rep. 252; *Story v. Van Rensselaer*, 2 Ib. 172.

(t) *Sprackling v. Ramer*, 1 Dick. 344; *Storrs v. Barlow*, 2 M. & K. 46; *Buller v. Low*, 10 Sim. 317; *Swift v. Duffield*, 5 Sergt. & Rawle, 38.

(u) *Doe v. Clark*, 2 Hen. Black. Rep. 399; *Trower v. Butts*, 1 Sim. & Stu. Rep. 181; *Rawlins v. Rawlins*, 2 Cox's Cas. 425. See, also, *Marselis v. Thalheimer*, 2 Paige, 35; *Hone v. Van Schaick*, 3 Barb. Ch. Rep. 488.

(v) *Gilmore v. Severn*, 1 Bro. C. C. 582; *Jenkins v. Freyer*, 4 Paige 47, 53-4; *Mason v. Jones*, 2 Barb. S. C. Rep. 229; *Collin v. Collin*, 1 Barb. Ch. Rep. 630; *Wms. on Exrs.* 935-6; and cases and authorities referred to in notes to the American edition. Where a trust of accumulation is created for the benefit of the children or issue of persons in being at the death of the testator, posthumous children of those persons will take as beneficiaries; because issue not already born to the persons named must be born, if ever, during their lifetimes, or within the period of gestation afterwards. And such posthumous children will be held to be issue, in the lifetime of their father, within the meaning of the statute which fixes a time beyond which accumulations cannot commence. *Mason v. Jones*, 2 Barb. Sup. Ct. Rep. 229.

fund bequeathed to children or others as a class, to be divided equally among the persons composing the class when they arrive at the age of twenty-one or marriage, only those who shall have been born or begotten when the eldest arrives at the age of twenty-one, or when the first of the class is married, is entitled to share in the fund.(w)

The word "children" does not, in common parlance or in its proper signification, extend further than the immediate descendants of the persons named; and consequently grandchildren, or issue generally, are not ordinarily included in that term.(x) It may, however, include them where it appears there were no persons in existence who would answer to the description of children, in the primary sense of the word, at the time of making the will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown, by the use of other words, that he used the word children as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren or stepchildren.(y)

Natural children, having acquired the reputation of being the children of a particular person, prior to the date of the will, are capable of taking under the description of "children."(z)

The law, however, appears to be settled, that where there are legitimate children in existence at the time of the making the will, so as to satisfy the words of the devise or bequest in their primary sense, an illegitimate child cannot take under a general devise or bequest to children, as a class, unless there is something appearing upon the face of the will to show that the testator intended to include others besides legitimate children.(a)

Although, as a general rule, a devise to children, without any other description, means legitimate children, and if the testator has such children parol evidence cannot be received to show that a different class of persons was intended, still, in these cases, as in all others, it is proper to look into circumstances *dehors* the will, to see whether there are any persons answering the description of the legatees in the legal sense of the term used; and if it appear that there are not any such persons, it is then allowable to prove the situation of the testator's family, to enable the court to ascertain who were intended by the testator as the objects of his bounty. Thus, in *Gardner v. Heyer*,(b) where the testator died a bachelor, but had for a long time lived and cohabited with M. Smith, by whom he had and left four children, a son and three daughters, who survived, and who had been by him placed at school and acknowledged as his children, and who were generally reputed as such

(w) *Collin v. Collin*, 1 Barb. Ch. Rep. 630; *Andrews v. Partington*, 3 Bro. C. C. 401; *Prescott v. Long*, 2 Ves. jun. 689; *Haste v. Pratt*, 3 Id. 730; *Whitehead v. Lord St. John*, 10 Id. 152; *Gilbert v. Boorman*, 11 Id. 238.

(x) *Radcliff v. Buckley*, 10 Ves. 195; 4 Mylne & Cr. 60; *Moor v. Raisbeck*, 12 Sim. 123; *Dickinson v. Lee*, 4 Watts' R. 82; *Hallowell v. Phipps*, 2 Whart. R. 376; *Scott v. Nelson*, 3 Port. R. 452; *Mowatt v. Carrow*, 7 Paige, 328.

(y) *Radcliff v. Buckley*, 10 Ves. 195; *Earl of Orford v. Churchill*, 3 Ves. & Beame, 69; *Mowatt v. Carrow*, 7 Paige, 328. The word children includes only the immediate legitimate descendants, and not a stepchild. *Lawrence v. Hibbard*, 1 Bradf. Surr. Rep. 252.

(z) *Wilkinson v. Adam*, 1 Ves. & Beam. 423, 454.

(a) *Cartwright v. Vawdry*, 5 Ves. Rep. 530; *Harris v. Lloyd*, Turn. & Russ. Rep. 310; *Swaine v. Kennerly*, 1 Ves. & Bea. 469; *Collins v. Hoaxie*, 9 Paige, 81.

(b) 2 Paige, 11.

by his friends; and by his will he gave to his son John \$10,000, to be paid to him when he arrived at the age of 24, the interest in the meantime to be applied to his maintenance and education; and he also gave to each of his daughters \$3,000, payable at the age of 21; and the interest in the meantime to be applied to their education and support; and he directed his executors and trustees to pay \$65 to M. Smith, the mother of the children, quarter yearly, during her life, if she remained single and had no more children; and he devised and bequeathed all the residue of his real and personal estate to his executors and trustees, and the survivor of them, in fee, in trust to pay two-thirds of the income thereof to his son John, and one-third to his daughters, during their lives, with remainder to their issue; and he gave cross remainders to the survivors in case any of the children should die without issue; and he also appointed the executors and trustees, or the survivor of them, guardians of the children during their minority, and earnestly requested that the utmost care should be taken of their morals and education. The Chancellor, upon the facts, declared that there was no doubt as to the legal and equitable rights of the children of Mrs. Smith, under the will.

2. "Grandchildren." The term "grandchildren" does not comprise great-grandchildren, unless, in analogy to the use of the term children, the testator has manifested his intention in the will itself, to give the term such extended signification.^(c)

A grandchild *by marriage* is not entitled under the description of of "grandchildren."^(d)

Where however, it appears that it was the intention of the testator to include the children of a stepchild among his grandchildren, such children will take accordingly. Thus in *Cutter v. Doughty*,^(e) the words of the devise were as follows:—"I give to my grandchildren and their heirs, my said farm as follows, to wit: to the children of my stepdaughter, lot No. 1; to the children of my daughter, lot No. 2, &c. A subsequent clause provided that if any of the devisees died without issue, their share was to be divided among the survivors of the testator's children or grandchildren. It was held by the Supreme Court, and the Court for the Correction of Errors, that the testator had denominated the children of his stepdaughter *grandchildren*, in the first clause of this will; and by the latter court in opposition to the Chancellor and the Supreme Court, that they were included under the same denomination in the last clause."

(c) *Howe v. Van Schaick*, 3 Coms. 538; 2 Eden, 196; *S. C.*, Ambl. 603, *nomine Hussey v. Dillon*, 3 Ves. & Beam. 59; 1 Rep. Leg. 69, 3d ed. See acc. the judgment of Lord Cottenham, in *Sanderson v. Bayley*, 4 Mylne & Cr. 60; and *Waring v. Lee*, 8 Beav. 247; *Hussey v. Berkley*. The testator bequeathed two thousand pounds "to the children and grandchildren of his brother I. P., deceased, excepting M. F. (who was a grandchild of I. P.) and her children, she and they not needing it, to be equally divided among those of them who may be then living, (viz., at the death of the testator's widow,) saving that his cousin S. R. should have two shares thereof." Held, 1. That the great-grandchildren of I. P. took equally with children and grandchildren. 2. That all who were alive at the death of the testator's widow, whether born before or after the testator's death, were entitled to take. *Pemberton v. Parker*, 5 Binney, 601.

(d) *Hussey v. Berkley*, 2 Eden, 196; *S. C.*, Ambl. 603; *nomine Hussey v. Dillon*, 1 Rep. Leg. 69, 3d ed. See, also, the judgment of Lord Cottenham in *Sanderson v. Bayley*, 4 Mylne & Cr. 60; and *Waring v. Lee*, 2 Beav. 247.

(e) 7 Hill, 305. See, also, *Howe v. Van Schaick*, 3 Coms. 538.

3. "Wife:" A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after taken wife.^(f)

4. "Nephews and nieces:" The principles already stated with respect to the restriction and enlargement of the terms "children" and "grandchildren," apply to the words "nephews and nieces." Therefore *great* nephews and *great* nieces are not ordinarily to be considered as comprehended in that description.^(g)

Nor will the expression "grand nephews and nieces," include the children of grand nephews and nieces.^(h)

But in this case also, the more enlarged sense will be attributed to the expression, where such is its meaning in view of the situation of the testator's family relations, or the context indicates the intention of the testator so to use it.⁽ⁱ⁾ Thus where the provisions of the will were as follows:—
Item third. I will and bequeath unto the children of my sister Catherine each five hundred dollars. *Item fourth.* I will and bequeath unto each of my nephews and nieces five hundred dollars, excepting John Cromer. *Item tenth.* I will and bequeath unto the children of my nephew, John Cromer, five hundred dollars," and the testator left a niece who had three children, one nephew, several grandnephews and nieces, the grandchildren of a deceased sister of the testator, of whom John Cromer was one, and a great-grandniece who was the only child of a deceased daughter of a deceased nephew of the testator, it was held that the provisions above quoted of the will, showed that the testator used the words nephews and nieces in an enlarged sense, so as to include all the grandnephews and nieces of the testator, whose parents were dead, and that the brothers and sisters of John Cromer, and the other grandnephews and nieces whose ancestors were dead at the time of the making of the will, were entitled to legacies. And further, that upon the ordinary rules of construction, parents and children could not both take under the description of the testator's nephews and nieces, but only the parents who were living, and those grandnephews and nieces whose parents were dead.^(j)

Of Mistakes in the Names or Descriptions of Legatees.

The general rule upon this subject is, that where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake will not disappoint the bequest. The error may be rectified, and the true intention of the testator ascertained, in two ways: 1. By the context of the will; 2. To a certain extent, by parol evidence.

1. The mistake may be rectified by the context. Thus, an error in the name of the legatee may be obviated by the accuracy of his description: as where a legacy is given to "my namesake Thomas, the second

(f) *Garraitt v. Niblock*, 1 Russ. & M. 629.

(g) *Falkner v. Buller*, Ambl. 514; *Shelley v. Bryer*, 1 Jacob, 207; 4 Mylne & Cr. 60.

(h) *Waring v. Lee*, 8 Beav. 247.

(i) "*James v. Smith*, 14 Sim. 214;" Wms. 947; *Cromer v. Pinckney*, 3 Barb. Ch. Rep. 466.

(j) *Cromer v. Pinckney*, 3 Barb. Ch. Rep. 466.

son of my brother," and the testator's brother has no son named Thomas, but his second son is named William, there is sufficient certainty in the description to entitle the second son.(k)

And, again, where the testator bequeathed to his brother Cormac Connolly, and to his two sisters, Mary and Ann, a certain residue, and afterwards by a codicil bequeathed as follows: "To my nephew, Cormac Connolly, the son of my brother, Cormac Connolly, the sum of five hundred dollars, for his ecclesiastical education, which sum is to be taken from what I have bequeathed to my brother, Cormac, and to my sisters, Mary and Ann." And it appeared that the testator never had a brother named Cormac, but that he had a nephew, Cormac, who was the son of his only surviving brother, James, who was pursuing classical studies in Ireland, with a view to an ecclesiastical education, and who was the only nephew of that name, it was held that the legatee intended by the testator, by the name of his brother, Cormac, was the father of his nephew, Cormac, and that his brother, James, was the person entitled to share in the residuary estate.(l)

So, where there was a bequest of two thousand dollars, in trust, for "the Ladies of the Ursuline Order, residing in Charleston, in the state of South Carolina," and it appeared by the testimony, that, at the time when the will was executed, there was an institution in the city of Charleston, South Carolina, which had been incorporated by the name of "The Ladies Ursuline Community of the city of Charleston;" that it was founded by Bishop England, and was still in existence, and that it had been, and was known and spoken of invariably, as "the Ladies of the Ursuline Convent," or "order," and that there had not been, and was not any similar society or institution in the State of South Carolina. These circumstances, it was held, rendered it certain beyond a question, who was intended by the description contained in the will, and the legacy was decreed to the Ladies Ursuline Community of the City of Charleston.(m)

So an error in the *description* may be obviated by the certainty of the *name*; as where a legacy was given to "Charles Millar Standen and Caroline Eliz. Standen, *legitimate* son and daughter of Charles Standen, now residing with a company of players," and it appeared that they were *illegitimate* children, their claim was, nevertheless, supported.(n) So, where there was a bequest to John Newbolt, *second* son of William Strangways Newbolt, vicar of Somerton; and the vicar of Somerton was William Robert Newbolt, and his *second* son was Henry Robert, and his *third* son was John Pryce; it was held that John Pryce Newbolt was entitled to the legacy; for that the maxim applied, *Veritas*

(k) *Stockdale v. Bushby*, 19 Ves. 381; *S. C.*, Coop. 229; See, also, *Dowset v. Sweet*, Amb. 174; *Smith v. Coney*, 6 Ves. 42; *Bradshaw v. Bradshaw*, 2 Younge & C. 72; *Bristow v. Bristow*, 5 Beav. 289; *Blundell v. Gladstone*, 1 Phill. Ch. C. 279; Wms. 988.

(l) *Connolly v. Pardon*, 1 Paige, 291. In *Thomas v. Stevens*, 4 John Ch. R. 607, a legacy to Cornelia Thompson was held a good bequest to Caroline Thompson, it appearing *alunde* that she was the person intended.

(m) *Banks v. Phelan*, 4 Barb. S. C. Rep. 80. See, also, *Hornbeck's Executor v. American Bible Society*, 2 Sandf. Ch. Rep. 133, and cases cited; *Careless v. Careless*, 1 Meriv. 384; *S. C.*, 19 Ves. 601; *Beaumont v. Fell*, 2 P. Will. 140; *Mann v. Executors of Mann*, 1 Johns Ch. Rep. 234.

(n) *Standen v. Standen*, 2 Ves. jun. 589; *S. C.*, 6 Bro. P. C. 193, Toml. edit.

nominis tollit errorem descriptionis.(o) So where the testator, being resident in India, bequeathed his residuary property to his "nearest relations in my native country, Ireland," sisters living in America were held entitled.(p) So where the bequest was "To Mary Smith, wife of Nathaniel Smith, three hundred dollars," and it appeared that Mary Smith was the wife of Abraham Smith, and that the name of the wife of Nathaniel Smith was Sarah Smith, it was held, upon parol evidence, however, going to show the relations of the testatrix with the conflicting claimants for the legacy, that Mary Smith, the wife of Abraham Smith, was the legatee intended by the testatrix.(pp)

2. The mistake may, to a certain extent, be rectified by parol evidence. It is obvious that the nature of this treatise will not allow of a full consideration of this wide and difficult subject: it may be sufficient in this place to mention the general principles established with respect to it.

It may, perhaps, be safely stated as a general proposition, that a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the court to identify the person intended by the testator.(q)

Further, in certain special cases, extrinsic evidence of the intention of the testator, (*e. g.*, proof of his *declarations*, at the time of making his will,) is admissible to make certain the person intended, where the description in the will is insufficient for the purpose.(r)

"In all cases in which a difficulty arises in applying the words of a will to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain who was the person really intended to take under the will, according to the maxim, "*Ambiguitas verborum latens, verificatione suppletur.*"(rr)

"There is, however, but one class of cases in which evidence of the testator's *declarations* can properly be admitted; and that is, of cases of equivocation, viz., where an ambiguity arises, from the admission of extrinsic evidences, as to which of two or more things, or which of two or more persons, *each answering the description in the will*, the testator meant to express.(s)

(o) *Newbold v. Price*, 14 Sim. 354.

(p) *Smith v. Campbell*, 19 Ves. 400.

(pp) *Smith v. Smith*, 1 Edwd. Ch. Rep. 189; *S. C.*, On appeal, 4 Paige. 271.

(q) This subject is discussed with much learning and ability by Vice-Chancellor Wigram, in his treatise on "The Application of Extrinsic Evidence to Interpretation of Wills." See, also, *Smith v. Smith*, 1 Edw. Ch. R. 189; 4 Paige, 271; *Banks v. Phelan*, 4 Barb. S. C. Rep. 80; *Gardner v. Heyer*, 2 Paige, 11; *Mowatt v. Carrow*, 7 Paige, 328; *Cromer v. Pinckney*, 3 Barb. Ch. Rep. 465.

(r) Wigram, p. 78 *et seq.*, 2d edit. Declarations of the testator cannot be received as evidence of what he intended by the terms nephews and nieces, in his will. *Cromer v. Pinckney*, 3 Barb. Ch. Rep. 466. See the judgment of Tindal, C. J., in *Miller v. Travers*, 8 Bing. 244. See, also, *Bradshaw v. Bradshaw*, 2 Younge & C. 72; *Duke of Dorset v. Harwarden*, 3 Curt. 80; *Wilson v. Squire*, 1 Y. & Coll. Ch. C. 654; *Danberry v. Coghlan*, 12 Sim. 507; *Doe v. Allen*, 12 A. & E. 451.

(rr) Wms. 990.

(s) "*Miller v. Travers*, 8 Bing. 244; *Doe v. Hiscock's*, 5 M. & W. 363; *Bradshaw v. Bradshaw*, 2 Y. & Coll. 72; *Duke of Dorset v. Harwarden*, 3 Curt. 80; *Wilson v. Squire*, 1 Y. & Coll. Ch. C. 654; *Danberry v. Coghlan*, 12 Sim. 507; *Doe v. Allen*, 12 A. & E. 45" Wms. 990.

"Accordingly, where a complete blank is left for the devisee's name in a will, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. But where a blank was left for the Christian name only, parol evidence was admitted to prove the individual intended.(*tt*) So in case of a devise "to Mrs. C." Lord Loughborough referred it to the Master, to receive evidence to show the person intended.(*u*)

The two last cases, perhaps, are only reconcilable with the principles of law applicable to this subject, on the supposition that the evidence went to establish, in the one case, that the claimant of the legacy, was a person whom the testator was in the habit of calling "Mrs. C.;" and in the other, that the claimant was a person whom the testator was in the habit of calling by the surname only.(*v*)

Where a testator has habitually called certain persons or things by peculiar names, and those names occur in his will, evidence of such habit seems receivable to explain the meanings of the will, in like manner as if his will had been written in cypher, or in a foreign language.(*w*)

Of Specific Legacies.

Of legacies there are two kinds—a general legacy and a specific legacy. A legacy is general, when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind: a legacy is specific, when it is a bequest of a *specified* part of the testator's personal estate which is so distinguished. Thus, for example, "I give a diamond ring," is a general legacy, which may be fulfilled by the delivery of any ring of that kind; while, "I give the diamond ring presented to me by A," is a specific legacy, which can only be satisfied by the delivery of the identical subject. Again, if the testator, having many brooches or horses, bequeath "a brooch" or "a horse" to B., in these cases the legacy is general. But a bequest of "such part of my stock of horses which A. shall select, to be fairly appraised, to the value of £800," or of "all the horses which I may have in my stable at the time of my death," is specific.(*x*)

The distinction between these two sorts of legacies is of the greatest importance; for, as has already been seen,(*y*) articles not specifically bequeathed, are to be first sold for the payment of debts; and articles so bequeathed, are not to be sold until the residue of the personal estate has been applied to such payment, and as it will hereafter more fully appear, if there be a deficiency of assets, a specific legacy will not be liable to abate with the general legacies, while, on the other hand, if the specific legacy fail, by the ademption or inadequacy of its subject, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate. So that, though specific legacies have in some respect the advantage of those that are general, yet, in

(*t*) *Baylis v. Atty. Gen.*, 2 Atk. 239; *Hunt v. Hort*, 3 Bro. C. C. 311; 8 Bing. 254; *Clayton v. Lord Nugent*, 13 M. & W. 200. See *Doe v. Westlake*, 4 B. & A. 57.

(*tt*) *Price v. Page*, 4 Ves. 680.

(*u*) *Abbot v. Massie*, 3 Ves. 148.

(*v*) See the observations of Rolfe, B., 13 M. & W. 207. See, also, *Lee v. Pain*, 4 Hare, 251. (*w*) 5 M. & W. 36.

(*x*) Wms. 993-4, and cases cited.

(*y*) *Ante*, p. 279; 2 R. S. 87.

other respects, they are distinguished from them to their disadvantage.(z)

Again, if there be a specific bequest of a thing described as already in existence, and no such thing ever did exist among the testator's effects, the legacy fails. Thus, although a gift of "my grey horse" will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description; yet, if the testator had no horse, the executor is not to buy a grey one; on the other hand, if the bequest is of "a horse," and no horse be found in the testator's possession at the time of his death, the executor is bound, provided the state of the assets will allow him, to procure a horse for the legatee.(a)

It seems to have been once considered as the criterion of a specific legacy, that it is liable to ademption.(b) But this has since been repeatedly denied. And it has even been held that a legacy may be specific, notwithstanding the testator expressly provides that it "shall not be deemed specific, so as to be capable of ademption."(c)

A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity in the nature of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called by the civilians a *demonstrative* legacy; and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific, that it will not be liable to abate with general legacies, upon a deficiency of assets.(d)

The courts, in general, are averse from construing legacies to be specific: and the intention of the testator, with reference to the thing bequeathed, must be clear.(e)

With respect to legacies of money, securities for money, debts, &c. "Under some circumstances, even pecuniary legacies are held to be specific, as of a certain sum of money in a certain bag or chest,(f) or in the hands of A.:(g) or of 200*l.*, the balance due to the testator from his partner on the last settlement between them, *if the testator did not draw such money out of the trade before he died.*(h) But a legacy of '£400 to be paid to A. in cash,' is a general legacy.(i) So a legacy of money, to procure a specified object for the legatee: as of a sum to buy a ring,(j) or to purchase lands(k) or government securities(l) for the legatee, is a

(z) Wms. 994, and cases cited.

(a) Wms. 994, and cases cited.

(b) Jac. & Walk. 601; Post, p. 399.

(c) *Jacques v. Chambers*, 2 Coll. 435; Wms. 995.

(d) Wms. 995.

(e) *Ellis v. Walker*, Amb. 310; *Kirby v. Potter*, 4 Ves. 748; *Innes v. Johnston*, 4 Ves. 568; *Webster v. Hale*, 8 Ves. 413.

(f) *Lawson v. Stitch*, 1 Atk. 508.

(g) *Hinton v. Pinke*, 1 P. Wms. 540, by Lord Chancellor Parker: *Crockett v. Crockett*, 2 P. Wms. 164; *Pulseford v. Hunter*, 3 Bro. C. C. 416.

(h) *Ellis v. Walker*, Amb. 310.

(i) *Richards v. Richards*, 9 Price, 226.

(j) *Apreece v. Apreece*, 1 Ves. & Beam. 364.

(k) *Hinton v. Pinke*, 1 P. Wms. 539.

(l) *Lawson v. Stitch*, 1 Atk. 507; *Gibbons v. Hills*, 1 Dick. 324.

general legacy. So a bequest of an annuity out of, or charged on the personal estate, is a general legacy."^(m)

"Stock or government securities, or shares in public companies, may be specifically bequeathed, where, to use the expression often applied, there is a clear reference to the '*corpus*' of the fund."⁽ⁿ⁾ Thus the word '*my*' preceding the word stock or annuities, has been several times adjudged sufficient to render the legacy specific: as where the bequest is of '*my* capital stock of £1,000 in the India Company's stock :'(o) or a legacy is given '*of my* stock,' or in '*my* stock,' or '*part of my* stock.'^(p) So where the testator, being possessed of £5,000 stock, bequeathed '*all the stock which I have in the three per cents. being about £5,000,*' Lord Thurlow held the legacy specific."^(q) So a bequest of all the testator's right, interest and property in thirty shares, in the Bank of the United States of America, is a specific legacy."^(r)

With respect to bequests connected with the realty. Every devise of land is specific:^(s) and so a bequest of a lease for years of a farm,^(t) is a specific legacy.

So a bequest of a rent out of a term of years is specific; as where the testator bequeathed £40 a-year to A. for life, out of his chattel estate at Kenn, and £10 a-year to B. for life, out of the same estate, which he gave to C.; these several bequests were held specific.^(u) But if it be apparent that the testator's meaning is to give the legatee *an annuity at all events*, the legacy will be a general one, though it is directed to be paid out of an estate or the rents of it; consequently, though the fund out of which the legacy is directed to be paid should fail, the legatee will be entitled to have his legacy made good out of the general personal estate.^(v)

But though general legacies do not become specific, because they are charged upon, or payable out of the proceeds of real estate, yet if the testator direct his freehold or leasehold estate to be sold, and dispose of the proceeds in such a form as to evince an intention to bequeath them specifically, the legacy will be properly specific.^(w) So, if a testator simply charges his real estate with a sum of money, and then bequeaths the money so charged, the real estate alone is liable to the payment.^(x) Again, where a testator in his will charges a legacy on a particular estate, and declares that it is to be raised out of such estate and not otherwise, the general estate of the testator is not liable for the payment of the legacy, in the event of the particular estate being insufficient for that purpose.^(z)

(m) *Allon v. Medlicot*, cited in *Lewin v. Lewin*, 2 Ves. sen. 417; *Hume v. Edwards*, 3 Atk. 693. See, also, *Sadler v. Turner*, 8 Ves. 617; *Raymond v. Brodbell*, 5 Ves. 199; *Kirkpatrick v. Kirkpatrick*, cited in *Roberts v. Pocock*, 4 Ves. 158; Wms. 996.

(n) See *Sibley v. Perry*, 7 Ves. 529, 530.

(o) *Ashburner v. McGuire*, 2 Bro. C. C. 108; *Barton v. Cooke*, 5 Ves. 461; *Norris v. Harrison*, 2 Madd. 279, 280.

(p) *Kirby v. Potter*, 4 Ves. 750, 751, by Lord Alvanley.

(q) *Humphreys v. Humphreys*, 2 Cox, 184; Wms. 997.

(r) *Walton v. Walton*, 7 Johns. 258.

(s) *Forrester v. Leigh*, Ambl. 173.

(t) *Long v. Short*, 1 P. Wms. 403.

(u) *Long v. Short*, 1 P. Wms. 403. And see the extract from Reg. Lib. in Cox's note.

(v) *Mann v. Copeland*, 2 Madd. 223; Wms. 1004.

(w) *Page v. Leapingwell*, 18 Ves. 463; 1 Rep. on Leg. 175, 3d ed.

(x) *Dickin v. Edwards*, 4 Hare, 273, 276.

(z) *Powell v. Murray*, 10 Paige, 256.

With respect to bequests contained in a residuary clause: The question whether such bequests are specific or general, may become important, where it is contended that the bequest is specific, so as to exonerate the personal estate, which is the subject of it, from debts and legacies, and charge the realty therewith; or where the personal estate, so bequeathed, comprises property which is wearing out rapidly, (such as leaseholds,) and it is given to one for life, remainder to another.

The bequest of all a man's personal estate generally is not specific: the very terms of such a disposition demonstrate its generality.^(a) And the circumstance of the bequest of the general personal estate being in the same sentence with that of the real, the devise of which is naturally specific, will not be sufficient to make it a specific legacy.^(b)

But if a man, having personal property at A. and elsewhere, bequeath all his personal estate *at A.* to a particular person, the legacy is specific; and if there is a deficiency of assets to pay other legacies, such a legatee shall not be obliged to abate with the other legatees.^(c) So where the testator bequeaths the residue of all his personal estate *in the island of Jamaica*, this is a specific legacy;^(d) and so is a bequest of all the testator's goods and chattels in a particular country.^(e)

To what articles or property legatees are entitled, under particular modes of description of the things bequeathed, such as "goods," "chattels," "all my goods," "household goods," "household furniture," "stock on farm," "securities for money," "debts," &c., may, in some instances, become matter of question; and the executor should, by proper inquiry, satisfy himself of the interpretation to be given to the language of the will in these respects, before discharging or paying the legacies.

Of Legacies vested or contingent.

It may be proper here to include some remarks relative to legacies *as vested or contingent.*

The cases establish the principle that contingent and executory interests, though they do not vest in possession may vest in right, so as to be transmissible to the executors or administrators of the party dying before the contingency on which they depend takes effect; but where that contingency is the endurance of life of the party till a particular period, the interest will obviously be altogether extinguished by his death before that period.^(f)

The present object is to ascertain the circumstances under which a legacy is to be regarded as a vested interest, or as contingent on the event of the endurance of the life of the legatee; or, in other words, in what cases the interest in a legacy will be so fixed as to be transmissi-

(a) 1 Rep. Leg. 215, 3d ed.

(b) 7 Ves. 138.

(c) Treat. Eq. bk. 4, pt. 1, ch. 2, sec. 5; *Sayer v. Sayer*, 2 Vern. 688; *S. C.*, Prec. Chanc. 392.

(d) *Nisbett v. Murray*, 5 Ves. 150.

(e) *Moore v. Moore*, 1 Bro. C. C. 127. So of all the goods in a particular room: *Green v. Symonds*, 1 Bro. C. C. 129, *in notis*: or of "all plate, linen and furniture in my house at A., or which shall be therein at the time of my decease:" *Gayre v. Gayre*, 2 Vern. 538; *Shaftsbury v. Shaftsbury*, Ib. 747; *Land v. Denaynes*, 4 Bro. C. C. 537; Wms. 1006.

(f) Wms. 759 and 1035, and cases cited.

ble to the executor or administrator of the legatee, though he die before the time arrives for the payment of the money; and, on the other hand, in what cases the legacy will lapse by the death of the legatee. The general principle as to the lapse of legacies by the death of the legatee may be stated to be, that if the legatee die before the testator's decease, or before any other condition precedent to the vesting of the legacy is performed, the legacy lapses, and is not payable to the executors or administrators of the legatee.(g)

"It has been established from the earliest period, both in the ecclesiastical courts and in equity, that unless the legatee survive the testator the legacy is extinguished; neither can the executors or administrators of the legatee demand the same. And Swinburne puts the case of the testator and legatee being drowned in the same ship, or both being struck to death by the fall of a house, in which case he lays it down that, as they both died at the same time, the legacy is not due, and consequently not transmissible to the executors or administrators of the legatee.(h)

"Not only in cases of bequests of money, or of other chattels in possession, but also of a debt due from the legatee to the testator, the legacy will lapse by his death before the testator, and the executor of the legatee must pay the money.(i)

Even in a case where a legacy is given to a man and his *executors, administrators and assigns*, or to a man and his *representatives*, if the legatee dies before the testator, though the executors are named, yet the legacy is lost; for the words "executors, administrators and assigns," &c., are considered as only descriptive of the interest bequeathed; and those who take by representation only, cannot be entitled to anything to which the person they represent never had any title.(j)

"Again, if a legacy be given to a man, and directed to be paid to *him or his executors*, or administrators, or personal representatives, or to his heirs, *at the end of a year after the testator's death*, and the legatee die before the testator, the legacy intended for him will lapse.(k)

"But this general rule may be controlled by the manifest intention of the testator, appearing upon the face of the will, that the legacy shall not lapse, and by his distinctly providing a substitute for the legatee dying in his lifetime. The authorities appear to have settled that a testator may, if he thinks fit, prevent a legacy from lapsing; though, in order to effect this object, he must declare, either expressly or in terms from which his intention can be with sufficient clearness collected, what person or persons he intends to substitute for the legatee dying in his lifetime.(l)

It is an established general proposition, that as to a devise or be-

(g) Wms. 1035.

(h) See Wms. on Exrs. 1036; 2 Kent. Comm. 434-5-6, and notes; *Moehring v. Mitchell*, 1 Barb. Ch. Rep. 264.

(i) Wms. on Exrs. 1037, and cases cited.

(j) Wms. 1038, and cases cited.

(k) *Ib.* In *Dickinson v. Purvis*, (8 Serg. & Rawle, 71,) there was a bequest of £500 sterling to a niece and her heirs, and the niece died in the lifetime of the testator; and it was held that the legacy lapsed.

(l) Wms. 1039-40, and cases cited.

quest to a designated individual, with a gift over in case of death, if the event happens in the testator's lifetime, a lapse does not necessarily ensue, but the ulterior gift takes effect on the testator's decease.(m)

Further, it seems to be now established, that where there is a bequest "to A. or his personal representatives," or "to A. or his heirs," the word "or," generally speaking, implies a substitution, so as to prevent a lapse.(n)

With respect to the application of the general rule above stated to legacies given in joint tenancy or in tenancy in common, it may be remarked, that "if a legacy be given to two persons *jointly*, although one of them happen to die before the testator, such interest will not be considered lapsed or undisposed of, but will survive to the other legatee. But where legacies are given to legatees as tenants in common, as where an aggregate fund is to be divided among them, *nominatim*, in equal shares, if any of them die before the testator, what was intended for those legatees will lapse into the residue. The law is the same as to survivorship, in cases of joint tenants, and lapse in cases of tenants in common, when the testator revokes the interest originally given to one of them. But it must be observed, that where a legacy is given to a *class* of persons in general terms, as tenants in common, as to the children of A., the death of one of them before the testator will not occasion a lapse of any part of the fund; but those of the described class who survive the testator will take the whole."(o)

By statute,(p) whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate. And this statute was held to apply where the will was executed previous to the Revised Statutes, and the testator survived his son, a devisee under his will, but both died subsequent to the Revised Statutes.(q)

By the word descendant in this statute is not meant any relative to whom, in some possible contingency, property of the testator might descend, but lineal descendants—issue of the body.(r) A legacy to a sister's child, therefore, is not a legacy to a descendant of the testator. Thus, where the testator bequeathed his personal estate, after several legacies, "to his brother James and his children, and the child of his sister Catharine, to be equally divided between them and their heirs and assigns forever," and the child of his sister Catharine died before the decease of the testator, it was held that her share lapsed, and, there being no gift of the residue, passed to the testator's widow and next of kin, as in case of intestacy; and further, that the issue of "the child of

(m) 2 Jarman, 671; *Lawrence v. Hobbard*, 1 Bradf. Surr. Rep. 256.

(n) Wms. 1011 to 1044, and cases cited.

(o) *Ib.* 1045-6

(p) Revised Statutes, part 2, chap. 6, title 1, sec. 52, (2d vol.,) p. 66.

(q) *Bishop v. Bishop*, 4 Hill, 133.

(r) *Armstrong v. Moran*, 1 Bradf. Surr. Rep. 314.

his sister Catharine" did not take the share intended for their deceased parent, by way of substitution, under the term "heirs," contained in the bequest; but the word "heirs" was there a term of "limitation," and not of purchase or substitution.^(s)

In conclusion of this portion of the subject of lapse, it may be mentioned that where a bequest is made to a man as trustee for another person, the legacy will not lapse by the death of the trustee in the testator's lifetime.^(t)

Of Legacies lapsed by the Death of the Legatee after the Death of the Testator.

If a legacy be given generally, without specifying the time when it is to be paid, it is due on the day of the death of the testator, though, by statute,^(u) not payable until after the expiration of one year from the time of granting letters testamentary or of administration. This delay is merely an allowance of time for the convenience of the executor, and does not prevent the interest vesting immediately on the testator's death. Hence, if the legatee happen to die within the year, his personal representative will be entitled to the legacy.^(v)

But when a future time for the payment of the legacy is defined by the will, the legacy will be vested or contingent, according as, upon construing the will, it appears whether the testator meant to annex the time to the payment of the legacy or to the gift of it.

In ascertaining the intention of the testator in this respect, the courts of equity have established two positive rules of construction: 1st, That a bequest to a person *payable* or *to be paid* at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in presenti solvendum in futuro*, and transmissible to his executors or administrators; for the words "payable" or "to be paid," are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate in the same manner, in respect to its vesting, as if the bequest stood singly, and contained no mention of time. 2d. That if the words "payable" or "to be paid" are omitted, and the legacies are given *at* twenty-one, or *if when, in case, or provided*, the legatees attain twenty-one or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment; consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy.^(w)

The application of these rules and the exceptions to the same, are considered at some length in the treatise of Sir Edward Williams on the law of executors and administrators.^(x) The doctrine is also fully

(s) *Armstrong v. Moron*, 1 Bradf. Surr. Rep. 314.

(t) Wms. 1050.

(u) 2 R. S. 90. sec. 43; 4th ed. 275, sec. 48; *Infra*, p. 403.

(v) See Wms. on Exrs. 1051.

(w) Wms. on Exrs. 1051-2, and cases cited.

(x) See Wms. on Exrs. 1051 *et seq.*

discussed and maintained in the very able opinions delivered by Savage, C. J., and Edmonds, Senator, in the Court of Errors of this state, in the case of *Paterson v. Ellis*.^(y) It was there held that, where the gift of a legacy is absolute, and the time of payment only postponed, as where the sum of \$1,000 is given to A., to be paid when he shall attain the age of 21, the time not being of the substance of the gift, postpones the payment, but not the vesting of the legacy; and if the legatee die before the period specified, his representatives are entitled to the money. But where the legacy is given *when* the legatee shall attain, or *provided* he does attain the age of 21, time is of the substance of the gift, and the legacy does not vest until the contingency happens. But even where the legacy is given *when* the legatee attains the age of 21, if the deviser directs the *interest* of the legacy to be applied in the meantime for the benefit of the legatee, there being an absolute gift of the *interest*, the principal will be deemed to have vested. So, the legacy will be deemed *vested*, if it be left to the discretion of a trustee to pay the legacy *sooner* than the time specified in the will; and it seems that the mere appointment of a *trustee* for the legatee during the minority, will have the same effect.^(z)

Of the Lapse of Legacies payable out of the Real Estate.

The rule with respect to the sinking of legacies charged upon and payable out of real estate, is somewhat different; and there are cases where it has been held that a legacy, made up partly of personal estate and partly of money charged upon lands, and to be raised out of the same, has, so far as regarded the personal estate, vested, and lapsed as to the part which was to come out of the realty.^(a)

The true rule with respect to the vesting of legacies payable out of real estate, is this: where the gift is immediate, but the payment is postponed until the legatee, for instance, attains the age of 21 years, or marries, there it is contingent, and will fail if the legatee dies before the time of payment arrives: but where the payment is postponed in regard to the convenience of the person and the circumstances of the estate charged with the legacy—and not on account of the age, condition or circumstances of the legatee—in such a case it will be vested, and must be paid, although the legatee should die before the time of payment.^(b)

The rule in question is always liable to the operation of the more general and powerful rule, namely, that the intention of the testator, to be gathered from the words of the will, must prevail.^(c)

It must be further observed, with respect to this general rule, that it may clearly be controlled by a direction in the will that the legacy should vest on the testator's death: thus, in a modern case,^(d) the testa-

(y) 11 Wen. 259.

(z) See, also, *Van Wyck v. Bloodgood*, 1 Bradf. Surr. Rep. 154.

(a) 2 Ed. Ch. Rep. 163.

(b) *Marsh v. Wheeler*, 2 Ed. Ch. Rep. 163; 1 Roper on Leg. chap. 9; *Birdsall v. Hewlett*,

1 Paige's Ch. R. 33; *Harris v. Fly*, 7 Ib. 429.

(c) *Brown v. Wankler*, 2 Y. & Coll. C. C. 134, 138.

(d) *Watkins v. Cheek*, 2 Sim. & Stu. 199.

tor gave legacies charged on his real estate to his two daughters, "*the same to vest in them immediately on my death*, but to be paid on their attaining their ages of twenty-one years, and the interest thereof in the meantime to be applied in their maintenance and education." The daughters both died infants; and it was contended that the legacies, as against the real estate, must sink for the benefit of the devisee: but Sir John Leach, V. C., held, that this was prevented by the express direction that the legacies should vest on the death of the testator; and, therefore, that the personal representatives of the daughters were entitled to the legacies.^(e)

One sort of conditional legacy has thus been considered, viz., where the condition is that the legatee shall be alive at a particular period. It remains to notice this species of legacy generally.

A conditional legacy is defined to be a bequest whose existence depends upon the happening or not happening of some uncertain event, by which it is either to take place or to be defeated.^(ee)

No precise form of words is necessary in order to create conditions in wills; but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect.^(f)

In the case of *Tattersall v. Howell*,^(ff) a legacy was given, provided the legatee changed his course of life, and gave up all low company and frequenting public houses. And Sir W. Grant held, that this was a condition such as the court would carry into effect, and directed the master to inquire whether the legatee had discontinued to frequent public houses, keeping low company, &c.

So, in *Dustan v. Dustan*,^(g) the executors were required by the will of the testator to pay to the legatee annually \$200, and also one-fifth of the testator's estate, in case the legatee should refrain from vicious habits, and conduct himself with sobriety and good morals. About two years after the testator's death, the legatee filed his bill against the executors, insisting that he had reformed, and claiming the payment of his share of the estate. The defendants had refused to pay over to the complainant his one-fifth of the estate, not being satisfied of his complete reformation. The provision in the will was supported, and as the complete reformation of the legatee was not distinctly proved, and a sufficient time had not elapsed between the death of the testator and the filing of the bill to enable the executors to form a sound opinion as to the permanency of the legatee's good conduct, it was held that the executors were right in refusing to place the whole property in his hands at that time, and it was referred to a master to ascertain and report whether there had been such a permanent reformation in his character and habits as to entitle him to receive the whole amount bequeathed to him, at that time.

Conditions are subject to the well known division into conditions precedent and conditions subsequent. When a condition is of the former sort, the legatee has no vested interest till the condition is per-

(e) Wms. 1078-9.

(ee) 1 Rep. Leg. 645, 3d. ed.; Wms. 1081.

(f) Wms. 1081; *Barruso v. Madan*, 2 Johns. 145.

(ff) 2 Meriv. 26.

(g) 1 Paige, 509.

formed: when it is of the latter, the interest of the legatee vests in the first instance, subject to be divested by the non-performance or breach of the condition.(gg)

Omitting all discussion of the subjects of the construction of conditional legacies; of conditions impossible, illegal or repugnant, or in restraint of the spending of the legacy; of the performance of conditions, whether precedent or subsequent; of conditions to prevent the contesting of the will, in restraint of marriage, &c., as tending to enlarge this work beyond its proper limits; it is still deemed expedient, in connection with the present topic, to advert to the rules laid down with respect to legacies given to executors.

"Where legacies are given to persons in the character of executors, and not as marks of personal regard only, such bequests are considered to be given upon an implied condition, viz.: that the parties clothe themselves with the character, in respect to which the benefits were intended for them. 'Nothing is so clear,' said Lord Alvanley, in *Harrison v. Rowley*(h) 'as that if a legacy is given to a man, as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor.'

"In order to make a proper application of this rule, two inquiries are necessary: First, when shall a legacy be regarded as given to a man *in the character of executor*? Secondly, what shall be a sufficient assumption of the character of executor to entitle the legatee, when a legacy is so given?

"First, when a legacy shall be regarded as given to a legatee in the character of executor, the presumption is, that a legacy to a person appointed executor, is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the will, to repel the presumption.

"But this presumption will be rebutted, if it should appear, either from the language of the bequest, or from the fair construction of the whole will, that a bequest to a person who is named executor, is given to him independently of that character; and then the legatee will be entitled to receive the legacy, whether he accepts the office or not.

"Secondly, what shall be a sufficient assumption of the character of executor to entitle a legatee, when a legacy is given to him in that character? If the legatee prove the will, with an intention to act under it, that will be a sufficient performance of the condition; or, if he unequivocally manifests an intention to act in the executorship, as by giving directions about the funeral of the testator, and be prevented by death from further entering upon his office, that will also be a performance of the condition.(hh)

"But the conduct of an executor after proving the will, may be such as to demonstrate that, instead of a *bona fide* intention to execute the trusts, he procured probate as a means of enabling him to violate, in the grossest manner, the confidence reposed in him by the testator. In

(gg) Wms. 1081.

(h) 4 Ves. 216.

(hh) Wms. 1103, and cases cited.

such a case, the mere act of proving the will cannot entitle him to the legacy meant for him."⁽ⁱ⁾

Morris v. Kent^(j) was a case under the present head, and was, in some respects, peculiar. There the testator appointed the defendant an executor of his will, and accompanied the appointment with a bequest, in these words—"hereby giving my said executor ten thousand dollars, for his care and trouble in executing that office." The widow of the testator, who was named an executrix, proved the will, and took out letters testamentary. The defendant, from apprehensions of great trouble in executing the will, and also of the inadequacy of the estate to discharge the legacy to him, at first resolved not to undertake the trust. In consequence, expenses were incurred to the amount of \$4,000, in the employment of a professional person as agent, to attend to the affairs of the estate; such assistance being absolutely necessary. Subsequently the widow, becoming dissatisfied with the agent, prevailed upon the defendant to act in the business, and he accordingly qualified as executor, and *entered upon* the active duties, taking charge of and managing the affairs of the estate. A balance of money which had remained in his hands he claimed a right to retain, towards payment of the legacy of \$10,000.

The bill was filed against him by the widow and son of the testator, who were the principal devisees under the will, for an account; and they insisted that the defendant had no right to retain for the whole of his legacy. On a reference to a master, he allowed \$6,000 to the defendant, being the balance of the legacy, after deducting the sum paid to the agent. To this report the defendant excepted, because the master had not allowed him the whole sum of \$10,000, and there was another exception for disallowance of interest.

The question in the case was, whether, under the circumstances, there should be a deduction from, or an apportionment of, the executor's legacy. In none of the previous cases had an abatement or apportionment, according to the services rendered, been made a question.

It was concluded that where a legacy to an executor is given in express terms, for care and trouble in executing the office, and to one of several executors, and this one delays, and for a time refuses to act, whereby the estate is put to additional expense for services which the executor was expected to perform, and for which the legacy was given, a court of equity should interfere to lessen the amount of his legacy, by charging him with what may fairly be considered the additional expense brought upon the estate by such delay or refusal; and that the present defendant was chargeable with the value of the services performed by the agent, which were within the province of the executor, and could equally as well have been performed by the defendant in that capacity, but not for the value of the services rendered by the agent in his professional character, for legal advice, and consequently not within the scope of the executor's duties; and that, in ascertaining upon this principle the sum to be deducted from the defendant's legacy, regard should be had to the amount of the latter, and to the whole ser-

(i) Wms. 1104.

(j) 2 Edw. Chan. Rep. 175.

vice which the executor was to perform, so that the allowance for the agent's services for the time he was employed, and the importance of his acts, might not appear disproportionate to the whole of the services which were expected of the executor for the compensation of ten thousand dollars.

In conclusion, it may be mentioned, that where personal property is bequeathed to executors, as trustees, the probate of the will is an acceptance of the trust.^(k)

Of Cumulative Legacies.

The subject of cumulative legacies is entitled to a passing notice. Legacies are said to be cumulative, as contra-distinguished from such as are merely repeated. Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both or only one; *i. e.*, whether the second legacy shall be regarded merely as a *repetition* of the prior bequest, or whether it shall be construed as an additional bounty, and *cumulative* to the former benefit. On this point the intention of the testator is the rule of construction.^(l)

The general rule on this subject, from a review of the numerous cases, appears to be that where the same specific time, or the same sum is repeated in the same writing, the legatee can claim the benefit of one legacy only. The latter bequest is held to be a substitution, and they are not taken cumulatively, unless there be some evident intention that they should be so considered, and it lays with the legatee to show that intention, and rebut the contrary presumption. Where two legacies of quantity of unequal amount are given to the same person, in *the same instrument*, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee is entitled to both. And where two bequests are in different instruments, as by will in the one case, and by a codicil in the other, whether of equal or unequal amounts, the presumption is in favor of the legatee, and the burthen of contesting that presumption is cast upon the executor. The presumption either way, whether against the cumulation, because the legacy is repeated in the same instrument, or whether in favor of it because the legacy is by different instruments, is liable to be controlled and repelled by internal evidence, and the circumstances of the case.^(m)

Of the Satisfaction of Debts by Legacies.

It is a rule established in the courts of equity, that where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt. This rule, however, though it has long prevailed, has met with the censure of several eminent judges, and the courts

(k) *Mucklow v. Fuller*, Jacob, 198; Wms. 1105.

(l) Wms 1105.

(m) *De Witt v. Yates*, 10 Johns. Rep. 156.

have inclined to lay hold of any minute circumstances whereupon to ground an exception to it.

Thus the presumption of satisfaction shall not be made, where the debt was not contracted till after the making of the will; for the testator could not have intended by the legacy to have satisfied a debt which did not then exist:(*n*) nor where the debt is due upon a current account; for the state of the account, and on whose side the balance lay, might be unknown to the testator:(*o*) nor where the debt was upon a bill of exchange, or other negotiable security; for the debt might have been transferred to a stranger by the legatee passing away the instrument.(*p*)

Again, an express devise for the payment of debts and legacies, the creation of a fund for the payment of debts, and a charge of the legacy upon that fund—if the legacy be uncertain, and made to depend on a contingency—if the payment of the legacy be postponed by the will to a time subsequent to that at which the debt is due and payable; or if the debt be due at the time of the testator's death, and the legacy be not made payable immediately, but at some future time, are each cases in which a legacy will not be considered as a satisfaction of the testator's debt:(*q*) and where the legacy is of less amount than the debt, it shall not be deemed a part payment or satisfaction.(*r*)

This subject was discussed by the Supreme Court, in the case of *Williams v. Crary, surviving executor, &c.*,(*s*) and Chief Justice Savage came to the conclusion, that the exceptions to the rule are so numerous, that the rule should be stated differently, to wit, that a legacy shall not be deemed a satisfaction of the pre-existing debt, unless it appears to have been the intention of the testator that it should so operate.(*t*)

Again; where the plaintiff sued the executors for board of a third person, which the testator had agreed to pay, it was held, that a legacy left by the testator to the wife of the plaintiff exceeding the amount of the claim, was not a satisfaction of the debt.(*u*)

“Again; a legacy of a specific chattel, however great its value, will

(*n*) Where A was bound by bond to pay B, during her lifetime, an annuity of \$1,000, and, at the time of the decease of B, the sum due upon the bond was \$4,000, it was held, that A was not entitled to recover an unsettled demand of \$1,500 against the estate of B, notwithstanding that the bond had been cancelled, in pursuance of a direction in the will of B that it should be so cancelled, on the payment by A of \$1,600—the testamentary provisions in relation to the bond being considered not as a legacy, but as a proposition of a settlement of all claims and demands between A and B—and it was holden that A was not entitled to recover, even for demands arising *after* the making of the will. Parol proof of the intention of the testator may, in such cases, be resorted to, not to give a construction to the language of the will, but to prove circumstances whereon to found inferences or presumptions. *Williams v. Crary*, 4 Wend. 443-4.

(*o*) However, in *Williams v. Crary*, 8 Cowen, 246, it was held, that a general bequest of a sum of money to a debtor, equal to, or exceeding the debt due, though it stand in an unliquidated account, is a satisfaction, if it appear either on the face of the will, or by evidence *aliunde*, to be so intended.

(*p*) Wms 929-30.

(*q*) *Edelen v. Dent*, 2 Gill & Johns. 185. A devise of lands to a creditor, though it be greater in value than the amount of the debt does not extinguish a debt or claim which he has against the testator. *Patridge's Admr v. Patridge*, 2 Harr & Johns. 63

(*r*) *Cranmer's case*, 2 Salk 508; *Graham v. Graham*, 1 Ves. sen. 263; *Williams v. Crary*, 4 Wend. 449, *per* Savage, Ch. J.

(*s*) 5 Cowen, 368, 8 Ib. 216, and 4 Wend. 449.

(*t*) 12 Wend. 64. See, also, Ib. 349.

(*u*) *Mulheran's Exrs. v. Gillespie*, 12 Wend. 349.

not be a satisfaction of a debt, unless the testator bequeaths it with such condition expressed, and the legatee accepts it by way of satisfaction.

"It is said, that a legacy shall in all cases be construed as a satisfaction, in case there be a deficiency of assets."(v)

Of a Legacy by a Creditor to his Debtor.

Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt, or mentions it in such a manner as to leave his intentions doubtful, and after his death the securities for the debt, if any exist, are found uncanceled among the testator's property, the courts of equity do not consider the legacy to the debtor as necessarily, or even *prima facie*, a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release: and if such intention does not appear clearly expressed or implied on the face of the will, evidence from other sources will be admitted.(w)

"In the present case," says Vice-Chancellor McCoun, in *Stagg v. Beekman and others, Executors of Rutgers, deceased*,(x) "the evidence of such intention is wanting, and the contrary is plainly inferable. The amount of bounty is fixed in the shape of a pecuniary legacy of one thousand dollars; an advance of five hundred dollars afterwards takes place; a note is given for it; this note is kept in the testator's possession uncanceled; and in the last codicil, nothing appears to show an intention to increase the bounty beyond what was originally contemplated; such, however, will be the effect, provided the complainant can retain the sum advanced, and also receive the benefit of the whole original bequest; taking the note and preserving it among his papers, are all circumstances which clearly indicate that the testator intended the advance should remain as a debt against his legatee, and be deducted and retained by his executors. This they have a right to do."(y)

The will authorized the executors at their discretion to compound debts, where the debtors, from misfortune or otherwise, might be unable to pay, or, if his executors thought it just, to forbear suing such debtors altogether. And the Vice-Chancellor held that the executors could not release this debt and pay the legacy under that provision: He says, "the clause in the will authorizing the executors to compound with any of the debtors to the estate, and to forbear suing altogether, is not sufficient to warrant a contrary conclusion. It does not go to the extent of releasing the debtors. It shows the humane and benevolent feelings of the testator towards those who might be poor and unfortunate; and although the complainant may be of that class, (as it was conceded that he was,) still the executors would hardly be justified, under their discretionary power, in suffering the opportunity to pass of realizing this debt, by a non-exercise of their right to retain and deduct the amount of the note and interest out of the legacy."

(v) Toller, 337.

(w) 1 Rep. Leg. 61, 3d ed; Wms. 935, and cases cited; *Clarke v. Bogardus*, 12 Wen. 67; *Stagg v. Beekman*, 2 Edw. Ch. Rep. 89; *Clarke v. Bogardus*, Id. 387; *Rickets v. Livingston*, 2 John. Cas. 98.

(x) 2 Ed. Ch. Rep. 92.

(y) "*Jeffer v. Wood*, 2 P. Wms. 128; *Rankin v. Barnard*, 5 Mad. R. 32."

Where a testator recites that a legatee is indebted in a certain sum, that recital binds the legatee, except in case of a clear mistake of figures."^(z)

Where a legatee is indebted to the testator, the executor may retain the legacy, either in part or full satisfaction of the debt, by way of set-off.^(a)

And so much of such debt as can be collected by the executor, including the interest due at the testator's death, is to be considered and treated as a part of the capital of the estate, and must be apportioned and distributed accordingly.^(b)

The rule is, that if a legacy be left to a testator's debtor, the debt shall be deducted from the legacy, for the legatee's demand is in respect to the testator's assets, without which, the executor is not liable, and, therefore, the legatee in such case, is considered by a court of equity to have so much of the assets already in his hands as the debt amounts to, and consequently to be satisfied *pro tanto*, for there can be no pretence to say, because the testator gives a legacy to his debtor, it is an argument to show that the testator meant to remit the debt.^(c)

In *Clarke v. Bogardus*,^(d) the testatrix gave to her daughter a legacy of \$750, as an evidence of her love and affection, and directed in case of the death of the daughter, that the same be paid to her children, or to their legal representatives. The husband of the daughter was indebted to the testatrix on a bond, conditioned for the payment of \$250 annually, to the obligee during her natural life. On the face of the will, neither the husband nor the bond in question were mentioned, and it was held that the legacy was not a satisfaction of the debt due the testatrix. "The legacy," said the court, "is given to the daughter of the testatrix, not as the extinguishment of a debt, but as evidence of the love and affection of the testatrix to a daughter who was well provided for, and in case of her death, to her children and their representatives, as if she intended that the husband should have no control over it."^(e)

At law, a testamentary act cannot operate as a release of a debt owing to the testator.^(f) By statute,^(g) as has already appeared in connection with the subject of the inventory,^(h) the discharge or bequest in a will of any debt or demand of the testator, against any executor named in his will, or against any other person, shall not be valid as against the creditors of the deceased; but shall be construed only as a specific bequest of such debt or demand; and the amount thereof shall be included in the inventory of the credits and effects of the deceased, and shall, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, shall be paid in the same manner and proportion as other specific legacies.

(z) "*Robinson v. Bransby*, 6 Mad. 348; Wms. 1119."

(a) Wms. 935.

(b) *Smith v. Kearney*, 2 Barb. Ch. Rep. 533.

(c) Tol. 338; 12 Wen. 69.

(d) 12 Wen. 67.

(e) See, also, *Clarke v. Bogardus*, 2 Edw. Ch. Rep. 387.

(f) Ram. on Assets, 469; *Slagg v. Beckman*, 2 Edw. Ch. Rep. 91.

(g) 2 R. S. 84, sec. 14.

(h) *Ante*, p. 247.

With respect to the effect of appointing a debtor to be executor, it has also already appeared, in connection with the subject of the inventory,^(hh) that by statute,⁽ⁱ⁾ the naming of any person executor in a will, shall not operate as a discharge or bequest of any just claim which the testator had against such executor, but such claim shall be included among the credits and effects of the deceased, in the inventory, and such executor shall be liable for the same, as for so much money in his hands at the time such debt or demand becomes due; and he shall apply and distribute the same in the payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased.

The revisers, in their note to this section, sufficiently explain its object, and the defects and mischiefs in the old law which it was intended to remedy and prevent. They say, as follows: "The debt of an executor is now liable to creditors, and in some cases to legatees; but when not required for these purposes, it is discharged or belongs to the executors, and is not to be distributed among the next of kin, unless it appear on the face of the will that the testator did not intend to discharge the debt."⁽ⁱⁱ⁾ Few persons are aware of this rule; and as well to avoid the disputes that arise, as to establish what is believed a just rule, this section is copied substantially from the laws of Maryland. Since an allowance is made to executors^(j) for their services, the reason of the old rule has ceased. The case of *Gardner v. Miller*,^(jj) shows how strongly the Supreme Court leans against that rule."^(k)

Creditor Executor.

A creditor who is appointed executor or administrator, as has also already been seen, cannot retain any part of the property of the deceased in satisfaction of his own debt or claim, until it shall have been proved to, and allowed by the surrogate; and such debt or claim is not entitled to any preference over others of the same class.^(kk)

Of the Ademption of Specific Legacies.

The subject of the ademption of legacies, is next to be considered. The general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain *in specie*, as described in the will; otherwise, the legacy is considered as revoked by ademption. For instance, if a legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also, if he should change its form so as to alter the specification of it, as if he should convert the gold chain into a cup, or the wool into cloth, or

(hh) *Ante*, p. 247. See, also, *Decker v. Miller*, 2 Paige, 149.

(i) 2 R. S. 84, sec. 13.

(ii) 2 Cowen's Rep. 809.

(j) See *post*, chap. 12.

(jj) 19 Johns. Rep. 88.

(k) 3 R. & or. S., App. 640.

(kk) 2 R. S. 88, sec. 33; *Ante*, 358.

make the piece of cloth into a garment, the legacy shall be adeemed.^(l) And if a specific legacy does not exist at the death of the testator, it is adeemed. And this rule prevails without regard to the intention of the testator or the hardship of the case.^(ll)

It must here be observed, that the rule of ademption does not apply to *demonstrative* legacies; i. e., to legacies of so much money with reference to a particular fund for payment; as, for instance, legacies given out of a particular stock, or debt, or term; for, although the particular fund be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate.^(m) A change of the subject matter of a legacy into a different fund, does not defeat the bequest.^(mm)

So, where the testator being the owner, at the time of making his will, of a bond for six thousand dollars, by his will directed the same to be collected and divided three years after his decease; and gave and bequeathed the same in certain different specified sums to various legatees; and afterwards, the obligors in the bond assigned to the testator a certain bond and mortgage for the same amount, and thereupon received back their bond; and the substituted bond and mortgage remained uncollected among the assets of the testator at the time of his death, it was held that the legacies were general and were not adeemed.⁽ⁿ⁾

If a debt, specifically bequeathed, be received by the testator, the legacy is adeemed; because the subject is extinguished, and nothing remains to which the words of the will can apply. So a partial receipt by the testator of the debt specifically bequeathed, will operate as an ademption *pro tanto*.^(o) Thus, where the testator, by his will, bequeathed to his grandchildren, D. H. P. and J. H. P., the proceeds of a bond and mortgage, conditioned for the payment of \$8,000, which he held against B. and S., and previous to his death, the testator commenced proceedings for the collection of the amount due upon the bond, which resulted in a sale by the mortgagors to N. Y. of a part of the mortgaged premises, for the sum of \$5,000; of which, \$1,700 was paid to the testator, and receipted on the mortgage, and the balance was secured by the bond of N. Y. & G. Y., for \$3,300, payable to the testator, and indorsed by him as a payment upon the mortgage; but the lien of the mortgage upon the part of the premises purchased by N. Y. was not released, and the testator received upon the bond of N. Y. & G. Y., the sum of \$1,641 during his lifetime: it was held, that the legacy bequeathed to D. H. P. and J. H. P., was a specific, and not a general pecuniary legacy, and that to the extent that any part of the proceeds of the bond and mortgage were used by the testator in the payment of debts or otherwise, so as to have lost their separate existence or identity, as such proceeds, the legacy was, *pro tanto*, adeemed; and that the surviving legatee was not

(l) Wms. 1132. See, also, *Walton v. Walton*, 7 John. Ch. Rep. 262.

(ll) *Beck, &c. v. McGillis*, 9 Barb. Sup. Ct. Rep. 35.

(m) Wms. 1132, and cases cited; *Doughty v. Stilwell*, 1 Brad. Sur. Rep. 300.

(mm) *Gardner v. Printup*, 2 Barb. Sup. Ct. Rep. 83; *Walton v. Walton*, 7 Johns. Ch. Rep. 258.

(n) *Doughty v. Stilwell*, 1 Bradf. Sur. Rep. 300. See, also, *Stout v. Hart*, 2 Halsted R. 414.

(o) Wms. on Exrs. 1133-4, and cases cited.

entitled to be reimbursed out of the testator's estate, for the moneys received by the testator upon the mortgage, or upon the bond given by N. Y. & G. Y. It was held, further, that what remained due upon the bond of N. Y. & G. Y., at the death of the testator, was the proceeds of the original securities, and that that sum was actually still due upon, and secured by the mortgage; the bond of N. Y. & G. Y. being no more than a collateral security to that amount. And that the amount due upon such bond passed as a part of the specific legacy.(p)

No distinction exists with respect to a specific legacy of a debt between a compulsory and a voluntary payment of it to the testator; in other words, between a case where the testator himself calls in a debt which he has bequeathed; and a case where the debtor unprovoked, and without solicitation, thinks fit to pay it. And it seems, it may now be considered as established, that the only rule to be adhered to in determining upon the ademption of a specific legacy, is to see whether the subject of the specific bequest remained *in specie* at the time of the testator's death; for if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion.(q)

When stock is specifically bequeathed, and it does not wholly, or does only in part exist at the testator's death, the legacy will either be totally or partially adeemed, as the case may be. And it is said that the legacy is irretrievably adeemed by the sale of the stock, and will not be revived by a new purchase of similar stock by the testator.(r)

But no ademption will take place when the stock specifically bequeathed is exchanged by act of law.(s) And where the testator, at the date of his will in 1830, had one hundred shares of the stock of the Firemen's Insurance Company, and by his will he bequeathed to his wife his stock in the Firemen's Insurance Company; and by the great fire in December, 1835, the stock of the Firemen's Insurance Company was rendered worthless, the whole capital stock of the company being absorbed by the losses which it incurred; and by an act of the Legislature, the company, with other insurance companies, was authorized to call upon its stockholders to fill up its capital stock, and the testator filled up but forty shares of his stock, and suffered the remainder to be issued to others, pursuant to the provisions of the act, and he owned the 40 shares at the time of his death; it was held, that as to so much of the stock the legacy was not adeemed.(t)

As to ademption of specific legacies of goods, it must be observed, that where the disposition of the subject is not absolute, the legacy will not be adeemed; as where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him, and passes to the legatee at his death, so as to enable him to call on the executor to redeem and deliver it to him.(u)

(p) *Gardner v. Printup*, 2 Barb. Sup. Ct. Rep. 83.

(q) *Humphries v. Humphries*, 2 Cox, 185; Wms. on Exrs. 1134-5, and cases cited. See, also, *Blackstone v. Blackstone*, 3 Watts R. 337.

(r) See Wms. on Exrs. 1136-6-7, and cases cited.

(s) Wms. 1136; *Walton v. Walton*, 7 Johns. C. R. 262-3.

(t) *Havens v. Havens and others*, 1 Sand. Ch. Rep. 324.

(u) Wms. 1137.

By statute, as has heretofore appeared in connection with the subject of the revocation of wills, it is provided that a conveyance, settlement, deed or other act of a testator, by which his estate or interest in property previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin, unless in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest. But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed or such condition do not happen.(v)

OF THE PAYMENT OF LEGACIES.

All Debts must be paid before any Legacies are satisfied.

Attention is now to be given to the payment of the legacies. It is obvious that as the whole personal estate is liable in the hands of the executor to the payment of the debts of the testator, the executor must take care to discharge them before he satisfies any description of legacy.

There is no distinction in this respect in favor of specific legacies. Hence, if an executor, although acting *bona fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest, if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate; and the court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors.(w)

Where the executor having notice of a claim against the estate of their testator, proceeded to pay some of his debts in full, and to make distribution of a portion of his estate among his children and legatees; and afterwards the claim in question was established, whereby the estate turned out to be insufficient for the payment of all the claims against it; it was held, that though the executors had acted in good faith, they were, nevertheless, liable to the creditors to the full extent of all the assets of the deceased; and that the payments to the legatees and next of kin of the testator should be disallowed.(x)

(v) 2 R. S. 65; 4th ed. 247; *Ante*, p. 323. See *Doughty v. Stillwell*, 1 Brad. Surr. Rep. 300; *Adams v. Winne*, 7 Paige, 97.

(w) Wma. 1149, and cases cited. *Tole v. Hardy*, 6 Cowen, 339.

(x) *Clayton v. Wardell*, 2 Brad. Surr. Rep. 7.

With respect to contingent debts, a question of great importance formerly existed: namely, whether an executor could safely make payment of legacies, or deliver over a residue, where there was an outstanding covenant of the testator (or bond with a condition or the like) which had never yet been broken, and which might or might not be broken thereafter. Under the Revised Statutes, all questions of this kind are set at rest. By the publication of a notice pursuant to the provisions of the statute relative to the payment of the debts of the deceased, inserted in the last preceding chapter,^(y) all claims against the deceased, for which the executor or administrator is liable, are ascertained. If a claim against the deceased, upon which his liability is contingent, be presented to the executor or administrator under the notice, it has been heretofore intimated^(z) that his proper course was to resort to a competent court to determine upon the settlement of his accounts, whether any, and if any, how much of the estate of the deceased should be reserved to await the question as to the liability of the deceased. The payment of debts of an inferior degree, and the discharge and payment of legacies, and distributive shares are, it was shown, protected as against claims of what description soever, not presented under the notice. The holder of a claim against the deceased, whether his liability is contingent or certain, not presented under the notice, it appeared had his remedy only against the assets of the estate remaining in the hands of the executor or administrator at the time of a suit commenced for the claim, or against assets thereafter to come into his hands, or against the legatee or next of kin of the testator or intestate. The executor having published the notice provided for by the statute, may safely pay and discharge the legacies of the testator, without incurring any risk of being afterwards called upon to pay contingent liabilities of the testator, the claims upon which were not presented under the notice.

The following statutory provisions relate to the payment of legacies:

Sec. 43. No legacy shall be paid by an executor or administrator until after the expiration of one year from the time of granting letters testamentary or of administration, unless the same are directed by the will to be sooner paid.^(a)

Sec. 44. In case a legacy is directed to be sooner paid, the executor or administrator may require a bond, with two sufficient sureties, conditioned that if any debts against the deceased shall duly appear, and which there shall be no other assets to pay, and there shall be no other assets to pay other legacies, or not sufficient, that then the legatee shall refund the legacy so paid, or such ratable proportion thereof, with the other legatees, as may be necessary for the payment of the said debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee; and that if the probate of the will, under which such legacy is paid, shall be revoked, or the will declared void, then that such le-

^(y) See *ante*, p. 323.

^(z) *Ante*, p. 357.

^(a) 2 R. S. 90; 4th ed. 275-6.

gatee shall refund the whole of such legacy, with interest, to the executor or administrator entitled thereto.^(b)

Sec. 45. After the expiration of one year from the granting of any letters testamentary or of administration, the executors or administrators shall discharge the specific legacies, bequeathed by any will, and pay the general legacies, if there be assets; and if there be not sufficient assets, then an abatement of the general legacies shall be made in equal proportions. Such payment may be enforced by the surrogate in the same manner as the return of an inventory, and also by a suit on the bond of such executor or administrator, whenever directed by the surrogate.

Sec. 46. In case any legatee is a minor, his legacy, if under the value of fifty dollars, may be paid to his father, to the use and for the benefit of such minor.^(c)

Sec. 47. If the legacy be of the value of fifty dollars or more, the same may, under the direction of the surrogate, be paid to the general guardian of a minor, who shall be required to give security to the minor, to be approved by the surrogate, for the faithful application and accounting for such legacy.

Sec. 48. If there be no such guardian, or the surrogate do not direct such payment, the legacy shall be invested in permanent securities, under the direction of the surrogate, in the name and for the benefit of such minor, upon annual interest; and the interest may be applied, under the direction of the surrogate, to the support and education of such minor.

Sec. 49. It shall be the duty of the surrogate, where there is no guardian of such minor, to keep in his office the securities so taken, and to collect, receive and apply the interest, and when necessary, to collect the principal, and re-invest the same, and also to re-invest any interest that may not be necessarily expended as aforesaid.

Sec. 50. On such minor coming of age, he shall be entitled to receive the securities so taken, and the interest or other moneys that may have been received; and the surrogate and his sureties shall be liable to account for the same.

Sec. 51. In case of the death of such minor before coming of age, the said securities and moneys shall go to his executors or administrators, to be applied and distributed according to law; and the surrogate and his sureties shall, in like manner, be liable to account to such executor or administrator.^(d)

The following sections of the statute provide for proceedings before the surrogate against executors and administrators for the recovery of both legacies and distributive shares.

Sec. 82. Any person entitled to any legacy, or to a distributive share of the estate of a deceased person, at any time previous to the expiration of one year from the granting of letters testamentary or of administration, may apply to the surrogate either in person or by his guardian, after giving reasonable notice to the executor or administrator, to

(b) 2 R. S. 90; 4th ed. 276.

(c) Ib. 91; 4th ed. 276.

(d) Ib.

be allowed to receive such portion of such legacy or share as may be necessary for his support.^(e)

Sec. 83. If it appear to the surrogate that there is at least one-third more of assets in the hands of such executor or administrator than will be sufficient to pay all debts, legacies and claims against the estate then known, he may, in his discretion, allow such portion of the legacy or distributive share to be advanced, as may be necessary for the support of the person entitled thereto, upon satisfactory bonds being executed for the return of such portion, with interest, whenever required.

Sec. 18. The surrogate having jurisdiction, shall have power to decree the payment of debts, legacies and distributive shares against the executor or administrator of a deceased person in the following cases :

1. Upon the application of a creditor, the payment of any debt, or a proportional part thereof, may be so decreed at any time after six months shall have elapsed from the granting of the letters testamentary or of administration.

2. Upon the application of a legatee or relative, entitled to a distributive share, payment of such legacy or distributive share, or its just proportional part, may be so decreed at any time after one year shall have elapsed from the granting of such letters.^(f)

And by the provisions of the Revised Statutes, relative to the rendering and settling of the accounts of executors and administrators,^(g) any person interested in the personal estate of the deceased, either as creditor, legatee or next of kin, may call the executor or administrator to an account before the surrogate, or the executor or administrator may voluntarily render such account, and upon assets appearing, the surrogate will decree payment of the claim, either in full or in part, according to the sufficiency of the assets.

By the above section, numbered 45, as has been seen, after the expiration of one year from the granting of the letters testamentary or of administration, the payment of the legacies may be enforced by the surrogate in the same manner as the return of an inventory ; and also by a suit on the bond of such executor or administrator whenever directed by the surrogate.

The following sections of the statutes provide for the recovery of legacies and distributive shares, by actions at law against executors and administrators.

Sec. 9. If, after the expiration of one year from the granting of letters testamentary or of administration there be more than sufficient assets in the hands of any executor or administrator to discharge the debts of the testator or intestate, and if, after reasonable demand made, and the offer of a bond with sufficient sureties, as in the next section prescribed by any legatee, or by any of the next of kin entitled to share in the distribution of the estate, such executor or administrator shall refuse to pay the legacy bequeathed by any will to such legatee, or the share of any such person entitled to distribution, he shall be liable to such

(e) 2 R. S. 96; 4th ed. 283.

(f) Ib. 116; 4th ed. 300.

(g) Ib. 92; 4th ed. 277 *et seq.*

action as the case may require, at the suit of such legatee or next of kin, or their personal representatives.^(h)

Sec. 10. Previous to the commencement of any such action, a bond to the executor or administrator shall be filed with the clerk of the court, with such sureties as the court, or any judge thereof, shall approve, in double the sum of such share or legacy, conditioned that if any debts owing by the testator or intestate shall afterwards be recovered or duly made to appear, for the payment of which there shall be no assets other than the said share or legacy, that then such person shall refund the legacy or share that may be recovered in such action, or such ratable part or proportion thereof, with the other legatees or representatives of the deceased, as may be necessary for the payment of the said debts, and the costs and charges incurred by a recovery against such executor or administrator in any suit therefor.

Sec. 11. When given by a legatee, the bond shall be further conditioned, that if no sufficient assets shall thereafter remain to pay any other legacy which may be due, that then such person shall refund such ratable part or proportion thereof, with the other legatees or representatives of the deceased, as may be necessary for the payment of the proportional part of such other legacy.

Sec. 12. A minor may bring such action by his guardian or next friend, as in other cases; but not until such guardian or next friend shall have filed, with the clerk of the court, a bond to the minor, in such sum and with such sureties as the court shall approve, conditioned that such guardian or next friend shall duly account to such minor when of full age, or to his personal representatives, in case of his death, for all moneys which may be recovered in such suit.

Sec. 13. In any such suit brought by a legatee, if it appear that there are not assets sufficient to pay all the legacies that may have been given, then an abatement shall be made in proportion to the legacies so given, and such legatee shall recover only a proportionate part.⁽ⁱ⁾

Sec. 19. Whenever an action shall be brought by any legatee against an executor or administrator, and the want of assets to pay all the debts of the deceased, and all the legacies bequeathed by him, or any of them, shall be pleaded, the cause shall be referred to referees, to examine the accounts of the defendants, and to hear and report upon the allegations and proofs of the parties in respect to such plea.^(j)

Sec. 20. Such referees shall proceed in the manner provided by law in respect to references of actions in which there is a long account; and all the provisions of law in relation to such references shall apply to referees appointed pursuant to the last section, and to their proceedings and the judgment thereon.

Sec. 21. In such cases, the costs of the action, or of either party, shall be paid as the court may direct, out of the estate of the deceased, or by the defendants personally, if their refusal to pay such legacy or their defence of the action shall appear to have been unreasonable.

Sec. 22. If the plaintiff in such suit shall recover only part of his

(h) Ib. 114; 4th ed. 299.

(i) 2 R. S. 115; 4th ed. 300.

(j) Ib. 450; 4th ed. 692.

demand, for the want of assets in the hands of the defendants, and assets shall afterwards come to their hands, he shall have a new action for the recovery thereof, or of the proportionate share thereof, to which he may be entitled; and the same proceedings, in all respects, shall be had in such action.

The above provisions, sections 43, 45, 2 R. S. 90, prohibiting the payment of legacies until the expiration of a year from the time of the granting of the letters, and directing such payment after the expiration of that time, were made with reference to the provisions of the statutes respecting the revocation of the probate on allegations of the next of kin, filed within a year after the probate, ^(k) and also to those regulating the publication by the executor or administrator, of a notice to creditors to exhibit their claims, by which a year must expire before the debts for which the assets are liable can be ascertained. After the year, the validity of the will being completely established, and the debts for which the assets in the hands of the executor are liable having been paid or ascertained, the surplus remaining after the payment of such debts becomes properly distributable among the intended recipients of the testator's bounty; and the executor cannot, in most instances, be permitted to retain that surplus in his hands. If there be litigations pending, or contingent liabilities of the testator, that may be a good reason for refusing to discharge the legacy in full, or even in part; but there must be some such cause shown to justify the executor in withholding payment. From the statutes, and for the sake of general convenience, the court presumes the personal estate to have been reduced into possession by the end of the year, and of consequence the claims of the legatees liquidated and entitled to be discharged.

Formerly every person entitled to any legacy or bequest, or to any share in distribution, was required, at the time of payment or delivery thereof, to give bonds in double the sum of such share or legacy, with two sufficient sureties, to the executors or administrators, conditioned to refund if debts should afterwards appear; ^(l) which was for the benefit of creditors as well as for the protection of the executor or administrator. But now, obviously, there is no necessity for such a bond, because the creditors have an ample remedy against the assets in the hands of the executor or administrator, under the provisions of the statutes relative to the publication of notice to exhibit claims, and by the same provisions the executor or administrator is protected in payments of legacies, or in distribution duly made after such publication. And the creditor who has not presented his claim under the notice, may still resort to the executor or administrator to the extent of the assets remaining in his hands undistributed at the time of the commencement of a suit for the claim; ^(m) and he may follow the assets in the hands of legatees or next of kin, to whom they have been delivered, paid or distributed. ⁽ⁿ⁾

Legacies, are, however, sometimes directed by the will to be paid before the year has elapsed, and therefore before the expiration of the

^(k) See 2 R. S. 61-62; *Post*, chap. 14.

^(l) See 1 R. L. 1813, 314, sec. 18.

^(m) See *ante*, p. 324-5.

⁽ⁿ⁾ See 2 R. S. 90, sec. 42; *Ib.* p. 451 *et seq.*

time within which proceedings for the revocation of the probate are allowed to be taken, and before the executor can have duly completed the publication of the notice for the exhibition of claims. The above section, numbered 44, 2 R. S. 90, provides for such a case, and requires the legatee to give a bond conditioned to refund if there should eventually prove a deficiency, or the probate should be revoked, or the will declared void. (For form of the bond, see Appendix, No. 60.)

It will be observed that the section leaves the executor or administrator the sole judge of the sufficiency of the sureties. He probably takes the bond at his peril in this respect. Whether the mere taking of the bond will protect the executor or administrator in the payment, if there should be a deficiency, or the probate should be revoked, or the will should be declared void, and the sureties in the bond should prove inadequate, is perhaps questionable. It may also be a question how far the legatee and his sureties will be liable to refund, in the case of a deficiency caused by the misconduct of an executor or administrator. Their liability, it is safe to believe, will depend, to a certain extent, upon the fidelity of the executor or administrator in managing the estate and conducting the administration.

The statute also considers that there may be a hardship in compelling indigent legatees, in all cases, to await the expiration of the year, before receiving any benefit from the testator's bounty. The above sections, numbered 82 and 83, 2 R. S. 98, accordingly provide for the payment, upon giving satisfactory bonds, and under the directions of the surrogate, of portions of legacies, before the expiration of the year, to legatees who may need the same for their support.

The provisions of those sections, it will be observed, extend and apply to distributive shares, in cases of intestacy, as well as to legacies; the reason for the payment being the same, and the payment being equally practicable in both instances.

The application of the legatee, widow, or next of kin, under these sections, should set forth distinctly his or her claim against the executor or administrator, and such facts respecting the situation of the estate, within the knowledge of the applicant, as will show that there is at least one-third more of assets in the hands of the executor or administrator than will be sufficient to pay or discharge all debts, legacies and claims against the estate then known; it should state that a portion of the legacy or distributive share is necessary for the support of the party, specifying the sum required, and should mention the names and residences of the sureties to be joined in the bond. The prayer should be, that, on giving the bond, the surrogate allow the sum required to be advanced by the executor or administrator. The application should be under oath. A copy should be served on the executor or administrator, with a notice that, on a certain day, which should be not less than four days after the service, the application will be presented to the surrogate, and that he will then be moved to grant the prayer thereof. On the appointed day, if the executor or administrator fail to appear, the applicant, on filing an affidavit of the service of the copy of the application and of the notice, will be heard *ex parte*; and if the application has been sworn to, and show the party entitled to an advance, and the proposed sureties be satisfactory, the surrogate will

probably, without further proof, order the advance to be made. The executor or administrator may appear and contest the truth of the statements in the application, or the sufficiency of the sureties. Witnesses may be examined, as in other cases, and the surrogate will thereupon determine whether, or upon what terms, the application shall be granted. An order should be made and entered in the surrogate's minutes, in conformity to his decision, allowing the advance, which should recite a summary of the proceedings, and state the sum allowed to be advanced in dollars and cents. The costs and expenses will, in most instances, have to come out of the legacy, as neither the estate nor the executor or administrator can properly be held chargeable for them on such a proceeding: the payment of the same should be provided for by the order. (For forms of the application, notice, bond and order, see Appendix, No. 61.)

An order for an advance thus made by the surrogate will doubtless protect the executor or administrator, if afterwards there should prove a deficiency, or the probate should be revoked, or the will declared void; and no satisfactory remedy could be had on the bond, provided, perhaps, that the executor or administrator has faithfully and honestly conducted the administration.

Of the Abatement of Legacies.

The above section, numbered 45, 2 R. S. 90, provides, that after the expiration of the year, the executor shall discharge the specific legacies bequeathed by the will, and pay the general legacies, if there be assets; and if there be not sufficient assets, then that an abatement of the general legacies shall be made in equal proportions.

"As to the abatement of general legacies: In case the assets be sufficient to answer the debts and specific legacies, but not the general legacies, the latter are subject to abatement. This abatement must take place among all the general legatees, in equal proportions.(o)

"Generally speaking, nothing shall, in such cases, be abated from the specific legacies. But if the testator bequeaths specific legacies, and also general pecuniary legacies, and directs by his will that such pecuniary legacies shall come out of all his personal estate, or words tantamount, then, if there be no other personal estate than the specific legacies, they must be intended to be subject to those which are pecuniary; otherwise the words of the bequest to the pecuniary legatees would be nugatory.(p)

"It must here be observed, that a *residuary* legatee has no right to call upon particular general legatees to abate. The whole personal estate, not specifically bequeathed, must be exhausted before those legatees can be obliged to contribute anything out of their bequest.

"The general rule is, that among legacies, in their nature general, there is no preference of payment; they shall all abate together, and

(o) Treat. Eq., book 4, part 1, ch. 2, sec. 5. With regard to general legacies of stock, the abatement will be regulated by the value of stock at the end of one year next after the testator's death. *Blackshaw v. Rogers*, cited *per curiam*, in *Simmons v. Wallace*, 4 Br. C. C. 349; *Anther v. Anther*, 13 Sim. 440, *per* Shadwell, V. C.

(p) *Wms. on Exrs.* 1165, and cases cited.

proportionally, in case of a deficiency of assets to satisfy them all. But this must be understood only as among legatees, who are all volunteers; for if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee,^(q) or of the relinquishment of any right or interest, as of her dower by a widow,^(r) such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties; and it should seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee. But it is requisite that the right or interest should be subsisting at the testator's death.

Under the provisions of the Revised Statutes,^(rr) giving to a post testamentary child the same portion of the real and personal estate of the father as would have descended or have been distributed to such child if the father had died intestate, all the devisees and legatees must contribute ratably, in proportion to the value of the real or personal estate devised or bequeathed to them respectively, to make up the distributive share of such post testamentary child. And in making such contribution, no distinction is to be made between specific, general and residuary legatees; but each legacy is to abate ratably, in proportion to its amount or value. Even a legacy given to the widow of the testator, in lieu of dower, must be taken into account in estimating the amount which the other legatees are bound to contribute, to make up the share of a post testamentary child in the estate of the father. But as between the widow and such child, the latter cannot take a child's portion of the real estate discharged of the widow's right of dower, and also a ratable proportion of a legacy given by the testator to the widow in lieu of such dower.^(s)

"It must here be observed, that a legacy, which is in its nature general, and given to a volunteer, will not be entitled to any exemption from abatement, on the ground of its being applied to any particular object or purpose. Thus, legacies of a certain sum each, to executors for their care and trouble, or of sums of money for mourning rings, or to servants, or to charities, are not to be preferred to other general legacies.^(ss)

Again: general legacies, although given for specific purposes, as for education or maintenance, must, as between themselves, all abate ratably in case of deficiency, unless there is something in the will of the testator indicating his intention that one should be paid in preference to another. But a legacy of piety, for the erection of head stones at the graves of the testator's parents, or other near relatives, does not abate ratably, and should be paid in full.^(t)

A direction to the executors to erect a monument at the testator's own grave, is not a legacy, but, as was stated in a previous chapter of

(q) See *Wood v. Vandenburg*, 6 Paige, 277.

(r) *Isenhardt v. Brown*, 1 Edw. Ch. Rep 411; *Williamson v. Williamson*, 6 Paige, 298.

(rr) 2 R. S. 65; 4th ed. 247.

(s) *Mitchell v. Blain*, 5 Paige, 588.

(ss) Wms. 1169, 1171, and cases cited.

(t) *Wood v. Vandenburg*, 6 Paige, 278.

this work, is to be considered as a part of the decedent's funeral expenses, where the rights of creditors are not affected.^(tt)

It is necessary here to refer to the class of legacies alluded to at a previous page, as being in the nature of specific legacies, and sometimes called demonstrative legacies, viz., bequests of money, with reference to a particular fund for their payment, and not simply a gift of the specific fund itself. Those legatees have such a lien upon the specific fund referred to, that they will not be obliged to abate with general legatees. And in this, as in the preceding cases, the testator's intention is the principle; for it is inferred that he, in referring to specific parts of his estate for payment of particular legacies, intended those legacies a preference to others which he had not so secured.^(u)

It has appeared that as long as any of the assets, not specifically bequeathed, remain, such as are specifically bequeathed are not to be applied in payment of debts, although to the complete disappointment of the general legacies. But when the assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies. So, a legatee entitled to a legacy of the sort just mentioned, in the nature of a specific legacy, must abate with the specific legatees.^(v)

Of the Executor's Assent to a Legacy.

If an executor pays one legatee, and there is afterwards a deficiency of assets to pay the others, the legatee so paid must refund a proportionable part. But, if the deficiency of assets has been occasioned by the waste of the executor, the legatee who has been paid may retain the advantage he has gained by his legal diligence, as against his co-legatees, but not against a creditor.^(w)

The assent of the executor to the legacy, it is said, is necessary to the due vesting of the same in the legatee. The whole personal property of the testator, as it has appeared in a former part of this work, devolves upon his executor.^(x) It is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors in the manner prescribed by the statutes; and before treated of,^(y) for the satisfaction of their demands, to the extent of the whole estate; without regard to the testator's having, by the will, directed that a portion of it shall be applied to other purposes. Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect.

Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator, by his will, expressly

(tt) *Wood v. Vandenberg*, 6 Paige, 273.

(u) Wms. 980, 1174.

(v) Wms. 1174.

(w) *Lupton v. Lupton*, 2 Johns. Rep. 614.

(x) *Ante*, p. 236.

(y) *Ante*, p. 284 et seq.

direct that he shall do so: for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors. Before such assent, however, the legatee has an inchoate right to the legacy, such as is transmissible to his own personal representatives, in case of his death before it be paid or delivered.

If the testator, by his will, forgive a debt due him, the debt is not discharged without the executor's assent, because such debt is a part of the assets, and it may become necessary to collect the same in order to pay the debts of the estate. As soon as the executor assents, and not before, the debt shall be effectually discharged.^(z)

It follows, from the rule respecting the necessity of the executor's assent, that if, without it, the legatee takes possession of the thing bequeathed, the executor may maintain an action of trespass or trover against him; so, although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of the debts, he has no right to retain it in opposition to the executor, by whom, in such case, an action will lie to recover it.

"If an executor refuse his assent without cause, he may be compelled to give it by a court of equity. With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form, and it may be either express or implied. The executor may not only in direct terms authorize the legatee to take possession of his legacy, but his concurrence may be inferred either from indirect expressions or particular acts; and such constructive permission shall be equally available. Thus, for instance, if a horse is bequeathed, and the executor requests the legatee to dispose of it, or if a third person proposes to purchase the horse of the executor, and he directs him to buy it of the legatee, or if the executor himself purchases the horse of the legatee, or merely offers him money for it, this amounts to an assent by implication to the legacy.

"Again, when the executor informs a legatee that he intends him to have the legacy according to the devise, or that the legacy is ready for him whenever he will call for it, such declarations clearly amount to a good assent to the bequest."^(a)

In a case^(b) where the executor had assented to the widow's retaining possession of certain household furniture bequeathed to her by the will, and afterwards brought an action of trover against her to recover the property, and was non-suited, the court refused to allow him his costs in the suit on a settlement of his accounts, and the Vice-Chancellor said, that "although, in strictness of law, the executor had a right to the possession of all the personal property left by the testator, and the widow could not take what was specifically bequeathed to her without his assent, inasmuch as it might be necessary for the payment of debts, yet if he were satisfied that no such necessity existed, it was competent for him to assent to her retaining the possession; and having once assented, he should not afterwards have brought the action against

(s) Wms. 1176.

(a) Wms. 1178-9, and cases cited.

(b) *Isenhart v. Brown*, 2 Edw. 341.

her. The defence which she had set up, was, that one or both of the executors had assented; and after some proof was gone into on her part upon the trial, in order to make out the facts, the executors submitted to a non-suit. I think it is apparent that there was no necessity for requiring her to give up the articles of personal property which had been left to her by the will. The attempt can hardly be justified. It was certainly not for her benefit or the advantage of the legatees generally, and he must bear the expense himself."

"On the other hand, since the assent to a legacy by an executor, may, in its consequences, be of great prejudice to him, it is but reasonable that the act or expressions deemed sufficient to impart that assent should be unambiguous.

"In certain cases the assent of the executor may be presumed, upon the principle, that, in the absence of evidence, the executors shall be taken to have acted in conformity with their duty; as when executors die after the debts are paid, but before the legacies are satisfied. So, as it should seem, the assent of an executor may be concluded from the legatee's possessing himself of the subject bequeathed, and retaining it for some considerable time without complaint by the executor.

"The assent of the executor may also be upon a condition precedent, as if he should tell the legatee that he will pay the legacy, provided the assets are sufficient to answer all demands.

"The assent of an executor shall have relation to the time of the testator's death. Hence, in the case of a devise of a term of years in a house or land, if, after the testator's death, and before the executor's assent, rent from the under-tenant becomes payable, the assent by relation shall perfect the legatee's title to this interest. So, such assent shall, by relation, confirm an intermediate grant by the legatee of his legacy."^(c)

The rules thus laid down, with respect to the assent of the executor to a legacy, had their origin and full effect under the system of administration which existed previous to the Revised Statutes. It may be doubted whether the doctrine has strictly any application under the present system. The phrase, "Executors assent to the legacy," however, continues to be used in the cases, and it has been deemed proper to state briefly the general principles of the law upon the subject.

At what Time Legacies are to be paid; and herewith of Bequests for Life, with Remainder over.

Within a year from the time of his appointment, the executor will have a sufficient reason for refusing his assent to a legacy, that his probate is liable to be revoked, and that he has not been able fully to inform himself of the state of the property, and to ascertain the debts against the testator. After that period has expired, as has been seen, he may be called upon to assent to and pay the legacies.

The allowance of the year, however, is merely for convenience, and so that the executor may not be disturbed in discharging the legacies

(c) Wms. 1179, 1180-1, and cases cited.

by attacks on his probate or by the claims of creditors. Therefore, if he entertain no apprehensions as to the validity of the probate, and the state of the testator's circumstances be such as to enable him to discharge legacies at an earlier period, he has authority to do so. The statutory provisions for the payment of legacies before the expiration of the year have been already considered. It is proper to remark that the executor can seldom feel himself called upon to discharge a legacy before that period has elapsed, except in accordance with the requirements of one or the other of those provisions.

If an annuity be given by will, it shall commence immediately from the testator's death, and consequently the first payment shall be made at the expiration of a year next after that event. Where an annuity is expressly directed to commence within the year, as at the first quarter day after the testator's death, or where an annuity is given with a direction that it shall be paid monthly, the money will be due at the first quarter day in the former case, and at the end of the first month after the testator's death, in the latter, although not payable by the executor till the end of the year.^(d)

In a case where a testator directed his executors and trustees to permit his wife to take the interest or dividends on three thousand pounds sterling British government three per cent. stock during her natural life, the question being from what time the widow was entitled to the dividends on the stock, the Vice-Chancellor said, "I infer, from the manner in which this is mentioned in the will, that the testator possessed the particular stock at the time of his death. He does not direct the trustees to make an investment for that purpose, as in other instances where he is desirous of creating an income for annuities; but the bequest is specifically of the interest or dividends upon three thousand pounds sterling British government three per cent. stock, which the trustees are to permit the widow to take during her natural life. I am of opinion, as the will takes effect from the death of the testator, the widow is, from that time entitled to the dividends, that is to say, the dividends which may accrue or be declared, or become payable at any time after the death of the testator."^(e)

But in the same case, where the testator directed the executors and trustees of his will to invest in stock of the United States, or of the state of New York, or such other bank stock as his wife should approve of, a sum of money as should produce the annual income, dividends or interest of one thousand dollars, lawful money of the United States of America; and from time to time, as the same should become payable, to permit his said wife to take such interest moneys, in the whole amounting to the said annual interest of one thousand dollars as aforesaid: It was held, inasmuch as the annuity was to arise, not from an investment already made, but one to be made in stock of the United States, or of this state, or of some bank; and as the testator had not appointed the time within which the investment should be made, that the executors might take one year for the purpose, in an-

(d) Wms. 1192-3, and cases cited.

(e) *Cogswell v. Cogswell*, 2 Edw. Ch. Rep. 236.

alogy to the time allowed by law for paying legacies.^(f) The gross sum to be set apart to produce the yearly income of one thousand dollars, was considered in the light of a legacy payable by law at the end of the year;^(g) and consequently it was determined that the widow could only demand the income to accrue from it as commencing at that time, and that she would be entitled to receive such interest or income quarterly, half yearly or annually thereafter, as dividends were declared.^(h)

A distinction has been taken between an annuity and a legacy for life. "If an annuity is given, the first payment is paid at the end of the year from the death; but if a legacy is given for life, with remainder over," it is laid down, "no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable there is no fund to produce interest."⁽ⁱ⁾

However, a different doctrine prevails with respect to a bequest of the *residue* of personal estate for life, with remainder over. For it seems now to be established, that the person taking the residue for life is entitled to the proceeds from the death of the testator.

Thus, in *Williamson v. Williamson*,^(j) the testator bequeathed to his wife the use of the residue and remainder of his personal estate, amounting to something more than \$30,000, during her life or widowhood, with remainder to his three sons, &c., and a question was, whether she was entitled to the interest upon the fund during the first year after the testator's death. Chancellor Walworth, after reviewing the English decisions on the point, says:

"The result of the English cases appears to be, and I have not been able to find any in this country establishing a different principle, that in the bequest of a life estate in a residuary fund, and where no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed from the time of the death of the testator. All the cases which appear to conflict with this rule, except the two decided by Sir John Leach,^(k) which are no longer to be considered as authority, will be found to be cases in which the testator had directed one species of property to be converted into another, or the residuary fund to be invested in a particular manner, and had then given a life estate in the fund as thus converted or invested. In such cases it appears to be consistent with the will of the testator to consider the life interest as commencing when the conversion takes place, or the investment is made, either within the year or at the expiration of that time. But, as a year is considered a reasonable time for the executor to com-

(f) 2 R. S. 90, sec. 43; *Ante*, p. 403.

(g) 1 Rep. on Leg. 583.

(h) 2 Edw. Ch. Rep. 237.

(i) *Gibson v. Bolt*, 7 Ves. 96; Wms. 1193.

(j) 6 Paige, 298.

(k) *Slott v. Hollingworth*, 3 Mad. Rep. 161; *Amphlett v. Parke*, 1 Sim. Rep. 280, in which Sir John Leach seems to have held, that the residue was composed of the capital and of the interest during the first year from the death of the testator; which capital and interest constituted a fund upon which the legatee for life was to have the interest from the end of the year.

ply with the testator's directions as to the conversion or investment, the legatee for life cannot be kept out of the interest or income beyond that period. In the case under consideration, there is no direction for a conversion of the fund, or for the investment thereof in any particular manner, before the right of the widow to the use thereof for life was to commence. And as it appears that a great portion of the personal estate was in bonds and mortgages, and other securities which were drawing interest at the death of the testator, there is no good reason for depriving her of the use of the residuary estate for an entire year."

At common law, if a man had granted by deed a term of years to A. for life, remainder over to B., A. had the whole term in him: and therefore no remainder could be limited after it. But, when long and beneficial terms came in use, the convenience of families required that they might be settled upon a child after the death of the parent. Such limitations were soon allowed to be created *by will*: and the old objections were removed, by changing the name from *remainders* to *executory bequests*: and it makes no difference whether the *term*, or the *lease*, or the *farm*, or the *use and occupation*, or the *profits* of the lands, or the *lands* themselves are bequeathed. The same reason required that such limitations might be created by deed; as, for instance, marriage settlements, to answer the agreement of the parties, and the exigencies of families. So, a bequest of household goods, after a prior gift for life, and without limiting the *use* merely to the first legatee, is valid.

It may here be observed that a gift for life of things, *quæ ipso usu consumuntur*, as corn or wine, *if specific*, is a gift of the property, and the old rule will prevail: but *if residuary*, the things must be sold, and the interest of the produce paid to the legatee for life.

With respect to cases where the testator simply bequeaths all the residue of his personal estate for life with remainder over, without any direction to invest it in any particular manner, it must be observed that, as between the tenant for life and the remainder-man, where the residue consists in part, or wholly, of property in its nature perishable, and daily wearing out, such as leaseholds, (not specifically given,) the tenant for life will not be entitled to the annual produce, which the property so wearing out is actually making, but to interest on the estimated value from the death.^(l)

In *Covenhoven v. Shuler*,^(m) it is laid down, that where there is a general bequest of a residue for life with a remainder over, although it includes articles of both descriptions, perishable and not perishable, as well as other property, the whole must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income only is to be paid to the legatee for life. That case, and the authorities there referred to, settle the principle that where there is a general bequest of a residue of the testator's personal estate for life, with a remainder over after the death of the first taker, the whole residuary fund is to be invested for the benefit of the remainder-man; and the tenant for life is only entitled to the interest or income of that fund. And to ascertain the amount of

(l) Wms. 1196, and cases cited.

(m) 2 Paige, 132.

such residuary fund, so as to apportion the capital and the income properly between the remainder-man and the tenant for life, the executor, upon settling the estate at the end of the year, must estimate the whole estate at what is then ascertained to have been its cash value at the testator's death, after paying all debts, legacies and expenses of administration, and other proper charges and commissions. But, in making such deductions for legacies payable at a future day, and which do not draw interest, the whole amount of the legacies is not to be deducted, but only such a sum, as, if properly invested, would, at the time when the legacies become payable, have produced the requisite sum, exclusive of all expenses and risk of loss. The rule in England, as between the legatee for life and the remainder-man, is to invest, or consider the fund as invested in the three per cents; being two per cent. less than the legal rate of interest in that country.⁽ⁿ⁾ Upon the same principle, according to the legal rate of interest here, the income of five per cent. stock, which stocks can generally be purchased at about the par value, may be considered as a reasonable discount upon a legacy payable at the end of the year, for the purpose of ascertaining the value of the residuary estate at the death of the testator.^(o)

Upon this principle it was stated in *Clark v. Clark*,^(p) that the bequest of the use of a residue for life or any shorter period, does not give the legatee the right to the possession of the fund in the meantime; and that the executor should either retain the fund and pay over the income thereof to the legatee as it accrues, or he should take ample security for the return of the principal at the termination of the particular estate therein, if he suffers it to go into the hands of the legatee to enable her to enjoy the use or income thereof.^(q)

It may be stated as a general rule, that where there is a bequest of the whole of the testator's personal estate, or of the residue thereof after payment of debts and legacies, to one person for life, with a remainder over to others after the termination of such life estate therein, the whole must be converted into money, and invested in permanent securities by the executor, and the income paid over to the person entitled to the life estate.^(r) The rule is the same where the residuary bequest for life, or for a limited term, embraces articles not necessarily consumed in the using; such as furniture, books, plate, &c., as well as property which must be so consumed; unless the will contains indication of an intention on the part of the testator, that the legatee for life should enjoy the property or some particular parts thereof in its then state, as a specific bequest for life.^(s)

Where, however, the bequest to the tenant for life is *specific*, the legatee in remainder is not entitled to have the property converted, notwithstanding, by reason of its being a decreasing fund; the legacies over may altogether fail.

(n) *Howe v. Earl of Dartmouth*, 7 Ves. 137.

(o) *Williamson v. Williamson*, 6 Paige, 306.

(p) 8 Paige, 160.

(q) See, also, *Cairns v. Chabert*, 9 Paige, 160.

(r) "*How v. Earl of Portsmouth*, 7 Ves. 137; *Fearn v. Young*, 9 Id. 549."

(s) *Mills v. Mills*, 7 Sim. Rep. 501; *Randall v. Randall*, 3 Mer. Rep. 193; *Collins v. Collins*, 2 Myl. & Keen, 703; *Alcock v. Soper*, Id. 699; *Bethune v. Kennedy*, 1 Myl. & Craig, 114; *Pickering v. Pickering*, 4 Id. 289; *Spear v. Tinkham*, 3 Barb. Ch. Rep. 211.

Where specific articles not necessarily consumed in using, are bequeathed to a legatee for life, with a limitation over and without any direction to the executor to hold them in trust for the remainder-man, the executor is authorized to deliver the same to the person entitled to a life estate therein; taking from such person an inventory and receipt, stating that such articles only belong to the first taker for life, and that afterwards they are to be delivered to the legatee who is entitled to them in remainder.(t)

The old practice of the Court of Chancery was to require the tenant for life to give security for the protection of the remainder-man; but such security is not now required, except a case of danger is shown."(u)

In *De Peyster v. Clendenning*,(v) the widow was entitled to the use of certain personal property appertaining to a farm, at the death of her husband, the testator, as a specific bequest to her for life, or so long as she should continue to reside there; and the Chancellor said, that "she must, in conformity to the practice on that subject, give to the administrator an inventory of the articles, specifying that they are in her custody as given to her while she resides on the farm only, and that when she dies or ceases to reside there, these articles, or those which may be substituted in the place of them, in the ordinary use of the farm, are to be delivered to the administrator, or to the trustees who may be appointed to carry into effect the provisions of the will."

If a legacy^a be given to A. to be paid at twenty-one, and the intermediate interest is not given, and A. dies before that period, his representative must wait for the money until A., if living, would have attained twenty-one.(w) But where interest is given during the minority, and the legatee dies under age, his executors or administrators will be entitled immediately on his death.(x)

Again, in case a legacy be left to A. at twenty-one, and if he die before that period, then to B., and A. dies before he attains his age, B. shall be entitled immediately, for he does not claim under A., but the devise is a distinct substantive bequest, to take effect on the contingency of A.'s dying during his minority.(y)

It should be remarked, that where a testator gives a legatee an absolute vested interest in a defined fund, so that, according to the ordinary rule, he would be entitled to receive it on attaining twenty-one,

(t) *Leake v. Bennet*, 1 West's Ch. Rep. 284; *Bell v. Kinaston*, 2 Atk. 82; *Foley v. Burnell*, 1 Bro. C. C. 279; *Spear v. Tinkham*, 2 Barb. Ch. Rep. 211.

(u) Wms. 1198, and cases cited; *Covenhoven v. Shuler*, 2 Paige, 123.

(v) 8 Paige, 295.

(w) *Anon.*, 2 Vern. 199; *Chester v. Painter*, 2 P. Wms. 336; *Roden v. Smith*, Ambl. 588; *Crickett v. Dolby*, 3 Ves. 13.

(x) *Globerry v. Sampen*, 2 Freem. 25; *Crickett v. Dolby*, 3 Ves. 13. But if a legacy be payable out of *land* at a future day, although given with interest in the meantime, if the legatee die before the day of payment, the court will not direct the legacy to be raised until the time for payment arrives; *Gawler v. Standewick*, 2 Cox, 15.

(y) *Papworth v. Moore*, 2 Vern. 283; *Saundy v. Williams*, 2 P. Wms. 478. But where legacies were given to A., B. and C., the three co-heiresses of the testator, to be paid at their respective marriages, and if either of them should die, her legacy to go to the survivors; and one of them died unmarried; it was held that the survivors should not receive the legacy of the deceased before their respective marriages, for the condition, though not repeated, was annexed to the whole, whether it accrued by survivorship or by the original devise; *Moore v. Godfrey*, 2 Vern. 620. See, also, as to a legacy charged on land; *Feltham v. Feltham*, 2 P. Wms. 271.

but by the terms of the will payment is postponed to a subsequent period, *e. g.*, till the legatee attains the age of twenty-five, the court will nevertheless order payment on his attaining twenty-one; for at that age he has the power of charging or selling or assigning it, and the court will not subject him to the disadvantage of raising money by these means, when the thing is absolutely his own.^(z) So, notwithstanding a legacy is directed to accumulate for a certain period, *e. g.*, until the legatee attains the age of thirty, yet, if he has an absolute indefeasible interest in the legacy, he may require payment the moment he is competent, by reason of having attained twenty-one, to give a valid discharge.^(a)

Of Compelling the Payment of Legacies or Distributive Shares by Proceedings in the Surrogate's Court.

The time for the discharge or payment of the specific and general legacies is fixed by the above section of the statute, numbered 45, 2 R. S. 90, at one year after the granting of the letters testamentary or of administration; and such discharge or payment, it will be observed, is expressly made the duty of the executor or administrator, after the expiration of that period.

The practice in the Surrogate's Court, on compelling payment of a legacy after the year has elapsed, may properly be considered in this place. The same 45th section above referred to, further provides, that payment of the legacy may be enforced by the surrogate, after the expiration of the year, in the same manner as the return of an inventory, and also by a suit on the bond of the executor or administrator, whenever directed by the surrogate.

The proceedings on compelling the return of an inventory were treated of at some length, in their proper order, in a previous portion of this work.^(b) The practitioner is referred to those pages, for whatever instructions may be required, to enable him, if practicable at all, to compel the payment of a legacy under the present section. It is proper to mention, that within the last four years,^(c) the provision in question has not been resorted to by suitors, in the court of the surrogate of New York, for compelling the payment of legacies.

This clause of the section also provides for enforcing the payment of the legacy, by a suit on the bond of the executor or administrator, whenever directed by the surrogate. The language here is not perfectly explicit, nor is the provision entirely free from difficulty. In what case or under what circumstances the directions of the surrogate are to be given, is not stated. The preceding portion of the sentence authorizes the enforcement of payment of the legacy, in the same manner as the return of an inventory; and an ultimate remedy, on compelling the return of an inventory, is, as has been seen,^(d) a suit on the

(z) *Curtis v. Sukin*, 5 Beav. 147, 155, 156; *Rocke v. Rocke*, 9 Beav. 66.

(a) *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115; 1 Cr. & Ph. 240; *Greet v. Greet*, 5 Beav. 123.

(b) See *ante*, chap. 7, p. 255, *et seq.*

(c) Previous to Feb. 1844.

(d) *Ante*, p. 255-6.

executor's or administrator's bond. The provisions for the prosecution of the bonds of executors and administrators, for neglecting to return an inventory, were, at the time the present section was enacted, the only ones allowing or regulating such suits.

It is probable, therefore, that the provision in question was intended to authorize a suit on the bond of the executor or administrator, on his refusing payment of a legacy, in a similar case to that in which such suit was authorized for not returning an inventory. In this view the provision may appear superfluous, as the antecedent portion of the clause would seem, by a necessary construction, to furnish the same remedy; but it is hardly possible to give to the sentence any other interpretation. The practice on prosecuting the bond, after disobedience to the surrogate's summons, was heretofore considered, when treating of the subject of the inventory,^(e) and the directions there given will, it is believed, apply to the present case.

The 19th section, 2 R. S. 116, amended act of 1830, chap. 320, sec. 23, heretofore referred to, in connection with the subject of the payment of the debts,^(f) authorizes the surrogate to cause the bond of the executor or administrator to be prosecuted, in case of his refusal or omission to perform a decree for the payment of a legacy; but that provision, it is supposed, applies not to the present section, but to the 18th section, 2 R. S. 116, also before considered, when treating of the payment of the debts,^(g) and presently again to be adverted to,^(h) expressly empowering the surrogate to decree payment of a legacy, after the expiration of a year from the granting of the letters, and to the provisions for a decree for payment, on the final settlement of an executor's or administrator's account. The 19th section thus referred to will be considered hereafter, as has already been intimated, under the head of the rendering and settling of the accounts of executors and administrators.⁽ⁱ⁾ It is believed that its provisions cannot be made available in aid of the section now under consideration. Upon the whole, it must be concluded that any recourse to this last clause of the 45th section, in practice, will prove very unsatisfactory; and as there are other sections affording every effective remedy which this clause can possibly furnish, that its provisions may be entirely disregarded.

The above section, numbered 18, 2 R. S. 116, provides that the surrogate shall have power to decree the payment of a legacy or distributive share, upon the application of a legatee or relative entitled to share in the distribution, at any time after one year shall have elapsed from the granting of the letters testamentary or of administration. This section, it will be perceived, extends to administrators in cases of intestacy, as well as to executors and administrators with the will annexed. There is the same reason in both cases. The debts having been paid or ascertained at the expiration of the year, as the executor is thereby enabled to proceed to the discharge or payment of the specific and general legacies, so it is competent for the administrator, where there

(e) *Ante*, p. 261.

(f) *Ante*, p. 347.

(g) *Ante*, pp. 325, 342.

(h) *Infra*, p. 421.

(i) See *post*, chap. 12.

is no will, at the same period to make the proper apportionment of the surplus remaining after the payment of the debts among the persons entitled in distribution.

This section has been treated of in some detail at a previous page of this work, in connection with the subject of the payment of the debts.^(k) The observations there made with respect to its provisions and the practice under it, on obtaining a decree for the payment of a debt there prescribed, apply in every particular to the proceedings now to be discussed. The reader is therefore referred to the remarks there presented, for the requisite directions for procuring a decree in the case under consideration.

The general form of the creditor's application for a decree under the section, is to be followed in the application of a legatee or relative entitled in distribution.^(kk) The petition of a legatee should set forth the will of the deceased, or such clause or clauses thereof as contain the bequests or provisions under which he claims. It should aver that he has requested payment of the executor, and that the executor has refused the same. It should also allege, if the fact be within the knowledge or information of the petitioner, that assets sufficient for the payment of all the debts against the testator, and for the discharge of the legacies, have come into the hands of the executor, and should require that he render an account of his proceedings in the performance of the duties of his trust, or that he admit a sufficiency of assets; and such special circumstances, within the petitioner's knowledge or information, relative to the situation of the estate or the conduct of the executor in the administration, may be included and charged in the petition as the petitioner may deem calculated to sustain or promote his claim.

The petition of a person entitled in distribution will, of course, declare the character in which his or her claim is made; and, if as next of kin, the degree of relationship which existed between the petitioner and the intestate. And similar averments and charges to those above prescribed for the petition of a legatee, should also be included. In other respects, as well as in some of those here spoken of, the contents of the petition of a legatee or distributee, for a decree for payment under the section in question, will be the same as those of a creditor in the case before treated of.

There will be the same necessity that the executor or administrator bring in an account on the return of the citation, to show cause or apply for time to do so, as was shown in the former proceedings for obtaining a decree for the payment of a debt. In a case where the legatee filed a bill in Chancery for enforcing the payment of a legacy, and called upon the executors to render an account of the property left by the testatrix, or to admit sufficient assets for the payment of the legacy, and the executors neither rendered an account nor stated in their answer that there was any deficiency of assets, the court presumed that there was sufficient assets for the purposes of the suit, and affirmed a decree for the payment of the legacy, considering that it

(k) *Ante*, pp. 325, 342.

(kk) Where a legacy is given to a *feme covert* for her separate use, the proceedings before the surrogate against the executor, to compel the payment of the legacy, should be instituted in the name of the *feme covert* only, by her next friend, *Guild v. Peck*, 11 Paige, 475.

would be a useless expense to direct an account to be taken of the estate of the testatrix which had come into the hands of the executors.^(l)

Witnesses may be examined on either side, touching any question arising between the parties, the same as in the case of a creditor's application for a decree for payment. The proceedings on contesting the account, if one be rendered, will be governed by the rules before indicated with reference to an account rendered on the return of a citation to show cause, issued at the instance of a creditor, and the decree will follow the same general form, and costs will be adjudged as in that case.

The mode of enforcing the decree will, of course, be the same as that before pointed out for enforcing a decree for the payment of a debt.^(m) Mr. Kirtland, in his treatise on the practice in Surrogates' Courts,⁽ⁿ⁾ says the decree for the payment of a legacy may be enforced by attachment and imprisonment of the executor.⁽ⁿⁿ⁾

It is proper in this place to state, that although the section in question, in terms, provides a very summary and effective means for fixing and declaring the liability of the executor or administrator for a debt, legacy or distributive share, claimants seldom avail themselves of the remedy which it appears to furnish. One reason for this is, that the statute does not specifically designate the practice to be pursued on obtaining the decree. The claimant is deterred from prosecuting an executor or administrator under the section, by uncertainty as to the regularity of his proceedings. The practice described in the former portion of this work, on obtaining a decree under the section for the payment of a debt, and above referred to as applicable to the enforcement of the claims of legatees and distributees, is suggested as effectual for the proposed purposes, and as in all respects unobjectionable. It is the same as has been approved in the cases which have been brought before the surrogate of the county of New York under the section.

Another reason why recourse is seldom had to the remedy intended to be afforded by this section, is, that an account is not, by its provisions, expressly required to be produced, and the rendering of an account has been deemed essential to the due adjudication of the rights of the respective parties. The account, however, as it has been attempted to show, is properly a part of the defence to the petitioner's allegations. If the executor or administrator, by his silence or by his neglect to furnish an account, permit a decree to go against him for the full amount of a claim, when there is a deficiency to pay other claims equally entitled in full, he will render himself personally liable for the loss. The decree of the surrogate for payment of the claim will not protect the executor or administrator in such payment in case there should be a deficiency. Other claimants will be entitled to their *pro rata* shares, the same as though the one who had obtained the decree had been paid only in an equal proportion with themselves, and the executor or administrator must personally bear the loss of the excess paid to that one. It is not for the court to assume that there will be

(l) *Smith v. Smith*, 4 Paige, 271.

(m) *Ante*, p. 347; *Post*, ch. 12.

(n) *Kirt. Surr.* (ed. 1835) 141.

(nn) See the subject of the jurisdiction of the surrogate to enforce his decrees by attachment considered, *Ante*, pp. 23, 31.

a deficiency; on the contrary, unless the executor or administrator prove the existence of other claims, and a want of assets to satisfy the whole, the court may conclude that there is a sufficiency for the purposes of the present proceedings, and at once *decree* payment of the claim. The petitioner cannot be obliged to establish the adequacy of the assets absolutely, because that is a matter of which the executor or administrator alone can have positive knowledge. It will usually be found impracticable for the executor or administrator to show a deficiency without bringing in an account. A mere averment of a deficiency could not be held a compliance with the statute or with the citation to show cause. If, therefore, the section means anything, it is submitted that it may be construed to authorize the surrogate to require of the executor or administrator such a statement of the condition of the assets, and of his proceedings in the performance of the duties of his trust, as will enable him to determine upon the claim of the petitioner; or, upon his neglect to render such statement, to hold him liable for the whole amount of the claim. It would not seem, then, that the omission by the statute expressly to require an account should cause any real difficulty in the case.

But the greatest obstacle which is met with in proceedings under this section, generally arises from the omission of the executor or administrator to publish the notice for the exhibition of claims provided for by the statute. The plea is almost always put in by the executor or administrator that the sufficiency of the assets for the required payment cannot be declared, because he has not advertised for and ascertained the claims against the deceased in the mode provided by law.

It will be remembered that the publication of a notice for the exhibition of claims is not distinctly imposed upon the executor or administrator as a duty—the terms of the statute are simply permissive; the executor or administrator *may* insert a notice in a newspaper, &c.(e) In considering this provision of the statute in connection with the subject of the payment of the debts, it was urged that this phraseology was not to be construed to the delay or injury of any person interested in the estate, and that the neglect of the executor or administrator to publish the notice, should not be allowed to protect him against a just demand when the proper time for payment had arrived.

But in the court of the surrogate of the county of New York, a different rule formerly prevailed, and the mere suggestion of the omission to publish the notice, was invariably held a sufficient reason for the adjournment of the proceedings against the executor or administrator, whatever they may have been, whether under the present section or under any other provisions of the statutes, for the requisite time to enable him to make or complete the publication. The ground on which this rule was adopted, was, that it is impossible to say whether there are assets for the payment of the petitioner's claim until the amount of the debts has been definitely ascertained, which can be done only by the advertisement. This would be conclusive as to the necessity and propriety of the delay, if the circumstance of the publication or non-publication of the notice were, by the terms of the statute, within the

(e) See 2 R. S. 83, sec. 34, *ante*, p. 347, *et seq.*

cognizance of the surrogate, and he could oblige the executor or administrator to inform himself, by advertising, pursuant to the statute or otherwise, as to the amount of the debts and the sufficiency of the assets. But the advertising for claims is entirely optional with the executor or administrator, and the surrogate has no control over him in respect to it. If the executor or administrator obtained an adjournment of the proceedings against him for the purpose of publishing the notice, and then refused to cause the publication, when the day arrived to which the matter had been adjourned, there was the same reason for a further postponement which there was originally, that the debts have not been duly advertised for and ascertained. From all which appears in the statutes, if the executor or administrator is entitled to one adjournment of a prosecution against him to enable him to advertise for claims, the same principle applies to entitle him to a second and a third, and indeed to any number, until he sees fit to insert the notice in the newspaper. The necessity for advertising is apparent to the executor or administrator from the outset, and remains the same, and there will be the same difficulty to the last, in positively declaring the sufficiency of the assets, unless he choose to advertise, and thus a decree for payment may be indefinitely delayed.

The true rule probably is, and such is the rule, it is understood, now prevailing in the court of the surrogate of the county of New York, that, at the end of the year, the executor or administrator is to be held to have received sufficient assets for the payment or discharge of the claim brought against him, unless he shows distinctly the existence of debts and demands for which the assets which have come into his hands are liable, and which such assets are insufficient to discharge. Some of the remarks above made with respect to the furnishing of an account on the return of the order to show cause, apply here. It is for the executor or administrator to show a deficiency. The court may assume that sufficient assets for the payment of the claim have come into his hands unless he prove the contrary.

If, by his neglect to publish the notice for the exhibition of claims, the executor or administrator has omitted to put himself in a condition fully to establish the defence of insufficiency, as the fault lies with him, he alone should suffer the consequences. In case debts subsequently appear against the deceased, and there be not sufficient assets to pay the same in full, or in the same proportion as that for which a decree has been obtained, or if it prove afterwards, upon advertising, that the claims, whether of creditors, legatees or persons entitled in distribution already discharged have been overpaid, the executor or administrator must bear the loss himself, and make up the deficiency out of his own property. This course, it is submitted, is in accordance with the intentions of the statutes, and is calculated to promote the ends of justice, and to insure fidelity and promptness in the administration.

By adopting the views here presented with respect to this section, and the practice under the same, it becomes a very important and effectual provision for fixing and declaring the rights of persons having claims against the assets in the hands of an executor or administrator. It may be observed, however, that care should be taken in decreeing payments against an executor or administrator, that the whole assets in

his hands be not exhausted thereby. He should be permitted to retain a sufficient portion to meet contingencies in the future progress of the administration, and to await a final settlement of his accounts and distribution thereupon. To what amount, or in what proportion relatively to each claim he should be so permitted to retain, will depend upon the situation of the affairs of the estate as duly represented and proved by him to the surrogate.

The enforcing the payment of legacies by proceedings to compel the executor or administrator to account before the surrogate, will be treated of in a future portion of this work, when the provisions of the statutes expressly regulating the rendering and settling of the accounts of executors and administrators come to be considered.

The above sections, numbered 9, 10, 11, 12, 13, 2 R. S. 114, 115, 19, 20, 21, 22, 2 R. S. 450, 51, provide for the recovery of legacies and distributive shares by suits in the common law courts against executors and administrators after the expiration of the year, as well in favor of minors as of persons of full age. The remedy in the Surrogate's Court or in a court of equity for enforcing the payment of a legacy, being more speedy and practicable, and except in the case of minors unattended with the giving of security, it is believed that those sections are seldom resorted to. They are included above, as forming a portion of the statutory system relative to the government of executors and administrators, and the disposition of the property of decedents; they do not seem to call for any particular comments.

To whom Legacies are to be Paid.

The inquiry to whom legacies are to be paid is one of great importance to the executor, who must be careful to pay legacies into the hands of those who have authority to receive them.

"If a legacy be given to A., to be divided between himself and his family, and the executor pays the legacy to A., it is well paid to discharge the executor.

"It is a general rule, that, where the legatee is an infant, and would be entitled to receive a legacy if he were of age, the executor is not justified in paying it either to the infant, or to the father, or any other relation of the infant, on his account, without the sanction of a court of equity.^(p) And even in the case of a child who has attained majority, payment to the father is not good, unless it be made by the consent of the child, or confirmed by his subsequent ratification.

"It may happen that an executor has, with the most honest intentions, paid the legacy to the father of the infant; nevertheless he will be held liable to pay it over again to the legatee on his coming of age. And although such cases have been attended with many circumstances of hardship on the executor, yet he has been held responsible, on the policy of obviating a practice so dangerous to the interests of infants, and so naturally productive of domestic discord."^(q)

By the above section of the statutes, numbered 46, a legacy of less

(p) *Genet v. Tallmadge*, 1 Johns. Ch. Rep. 3; *Morrell v. Dickey*, 1 Johns. Ch. Rep. 153.

(q) *Wms* on Exrs. 1206-7, and cases cited.

than the value of \$50 to a minor, may be paid to the father of the legatee to the use and for the benefit of such minor.

By the next section, if the legacy be of the value of \$50, or more, the general guardian of the minor is entitled, under the direction of the surrogate, to receive it, and he is to be required to give security to the minor, to be approved by the surrogate, for the faithful application and accounting for such legacy. It will hereafter appear in that portion of this work treating of the appointment of guardians, that a general guardian, excepting one appointed by deed or will, before obtaining his letters, is obliged to give security to the minor for the faithful discharge of the duties of his guardianship. The present section furnishes an additional safeguard to the minor's interest, by providing especially for the preservation for his benefit of a legacy bequeathed to him. And it would seem from the section that, although the legacy in the particular case is the only property of the minor, and the appointment of the guardian is for the sole purpose of receiving it, yet that the guardian must give double security, once before the grant of the letters of guardianship, and once to enable him to receive the legacy.

The term general guardian, includes guardians appointed by deed, testamentary guardians, and those appointed by the Court of Chancery or the Surrogate's Court. Either of these must comply with this provision before he is authorized to receive a legacy bequeathed to his ward. Until security to the minor has been given by the guardian and approved by the surrogate, and his directions for payment of the legacy obtained, the guardian is not in a condition to receive, nor is the executor authorized to pay the legacy. It follows from this, that the guardian cannot take proceedings, at least in the Surrogate's Court, to compel the payment of the legacy, unless he has first procured the direction of the surrogate. In *Hoyt v. Hilton*,^(r) the Vice-Chancellor intimates an opinion that the surrogate may direct the payment of a minor's legacy to his guardian without requiring security, but the last clause of the present section of the statute does not seem to have been adverted to in the case. It is submitted that the language of that clause is imperative, and cannot be construed to allow the security to be dispensed with.^(s)

The kind or amount of the security which is to be taken is not defined, but rests entirely in the discretion of the surrogate. A bond with one or more sureties in double the amount of the legacy, will usually be demanded.

The proper form of proceeding on the part of the guardian, in order to receive a legacy bequeathed to his ward, is, to present to the surrogate a written application, alleging the legacy and offering the security, and praying a direction for the payment. If the surrogate consider the proposed security sufficient, on the same being given his direction for the payment will be made. The custody of the instrument of which the security consists is not prescribed by the statute, but it is

(r) 2 Edw. Ch. Rep. 203.

(s) A general guardian cannot sustain a bill in Chancery for the payment of a legacy. A suit for the benefit of infants should be brought by a *prochein amy*; and since the Revised Statutes, no one else can do it. "I hold the statutes," says the Vice-Chancellor, in the case last referred to, "to be imperative on this head."

doubtless to be filed with the surrogate. The direction of the surrogate for the payment will be given in writing in the shape of an order, which must be duly entered in the minutes. It cannot be too strongly impressed upon the executor, that he should be careful, before paying a minor's legacy to his guardian, to see that the direction for the payment has been given by the surrogate, as otherwise he will always remain liable to the legatee for the amount of his legacy, in case his guardian shall have misapplied it.

A person appointed a guardian to an infant, in another state, is not entitled to receive from the administrator here the legacy or portion of the infant. The guardian must be appointed here, and give competent security, to be approved of by the court, before the payment of the infant's money will be ordered.^(t)

The above sections, numbered 48, 49, 50 and 51, provide for the payment to the surrogate of a legacy bequeathed to a minor, having no general guardian, or where direction for the payment to the guardian is refused, for the investment and subsequent disposition thereof. They are perfectly explicit in their provisions, and do not suggest any subject for remarks.

The above section of the statute, numbered 12, in connection with the preceding sections, numbered 9, 10 and 11, and the following 13th section, provides for and regulates the recovery of legacies bequeathed to minors, and also of distributive shares to which they are entitled, by suits at law against executors and administrators. They offer nearly the same protection to the minor's interests as is provided by the sections above considered.

"When the direction to the executor is not to pay the legacy to the child, but the bequest is made to a *trustee* for him, the executor will be justified in paying the money to the person so appointed. Hence, if the testator order the sum to be paid to the father, he will be a trustee for his child, and entitled to receive the money, and his receipt will be a good discharge to the executors. It would appear, on principle, that the direction for payment to the trustee must appear upon the face of the will, and cannot be proved by parol evidence."

It may also be observed, that an executor cannot, without risk, unless under the direction of the surrogate or of a competent court, pay any *part* of a legacy bequeathed to an infant, either to the infant, or to any person for his use; therefore, the executor is not justified in applying any part of the *capital* of the legacy for the maintenance or advancement of the child, or any other purposes than mere necessities, without the sanction of the court. But with respect to the *interest* of the sum bequeathed, it should be seen, that the executor may apply a requisite part of it for the support of the infant legatee, without the authority of the testator, if he does no more than the court would have directed, if it had been resorted to in the first instance; for the principle is established, that if an executor do, without application, what the court would have approved, he shall not be called upon to account, and forced to undo that, merely because it was done without application.^(u)

(t) *Morrell v. Dickey*, 1 Johna. Ch. Rep. 153.

(u) See *Wms. on Exrs.* 1208-11, and cases cited.

The case in which a portion of a legacy may, under the order of the surrogate, be advanced to a legatee, previous to the expiration of the year, as necessary for his support, has already been treated of;(v) and, after the year has elapsed, and there is no further object in requiring security, where the executor has made advances to a minor legatee, although without the order of the surrogate, he will probably be protected, if he show that such advances were necessary for the minor's support, and were made under such circumstances as would have authorized the surrogate to allow them, if the application had been made previous to the expiration of the year. It may be added, that if a court of equity can discover a clear act of the legatee, when of age, confirmatory of the application of his legacy by the executor, during his minority, it will hold him estopped from claiming a repayment.(w)

Where a testator is the parent, or in *loco parentis*, of an infant legatee, whether the legacy be contingent or vested, interest on the legacy shall be allowed as a maintenance from the time of the death of the testator. This subject will be pursued hereafter, together with the subject of interest generally.(x)

It was formerly the law, that if a legacy was given to a married woman, it should be paid to the husband. So, where a legacy was given to a married woman living separate from her husband, with no maintenance, and the executor paid it to the wife, and took her receipt for it, yet, on a suit instituted by the husband against the executor, he was decreed to pay it over again, with interest.(y) It was also adjudged, that if the husband and wife were divorced *a mensa et thoro*, and a legacy was left to her, the husband alone might release it,(z) and, consequently, to him alone was it payable.(a)

But the Court of Chancery, upon the application of the wife, might restrain the husband from proceeding at law to obtain the possession of a legacy, or a portion in personal estate which came to her by will or inheritance, until he made a proper provision for her support. The court, however, would not allow a maintenance to the wife out of the property which at law belonged to the husband, by virtue of his marital rights, although she had an equity therein, while she was living separate and apart from her husband, against his consent, and without any justifiable cause.(b)

But now, by statute,(c) any married female may take, by devise or

(a) See *supra*, pp. 425-6.

(w) 1 Rep. Leg. 771, 3d ed.; Wms. 1210.

(x) See Wms. 1211; *I. infra*, p. 429, *et seq.*

(y) "*Palmer v. Trevor*, 1 Vern. 261; Toller, 320. See, also, *Steed v. Calley*, 2 M. & K. 52."

(z) *Stephens v. Totty*, Cro. Eliz. 90^s, and other authorities cited; Wms. 1213-14, n.

(a) "*See Green v. Olte*, 1 Sim. & Stu. 250;" Wms. 1213.

(b) *Fry v. Fry*, 7 Paige, 461. See, also, *Udall v. Kenney*, 3 Cowen, 590; 5 John. Ch. Rep. 564; *Haviland v. Bloom*, 6 John Ch. Rep. 173; *Van Eppes v. Van Deusen*, 4 Paige, 64; *Van Duzer v. Van Duzer*, 6 Ib. 366; *Dunn v. Browyer*, 2 McCord, 368; 1 West's Rep. 581; 2 Kent's Comm. 138 *et seq.*; 2 Story's Eq. Jur. 630 *et seq.* The equity of a married woman for a settlement does not survive to her children; and where there is no contract for a settlement, nor any proceeding by the wife to enforce one during her life, the creditors of the husband are entitled to a legacy bequeathed to her, and her children have no equity to prevent its payment to them. *Barker v. Woods*, 1 Sandford's Ch. Rep. 129.

(c) Act for the more effectual protection of the property of married women, passed 7th April, 1848; S. L. 1848, ch. 200, p. 307. Amended by ch. 375, of the Laws of 1849, passed 11th April, 1849; S. L. 1849, 528; 2 R. S. (4th ed.) 331. See *ante*, pp. 57, 217-18.

bequest, and hold to her sole and separate use, real and personal property, and any interest or estate therein, in the same manner and with the like effect as if she were unmarried. An executor, therefore, may now safely pay to a married woman a legacy bequeathed to her since this statute took effect, and her receipt will be a valid discharge for the same. Indeed, she is the only person entitled to receive such legacy, and a payment to her husband would not protect the executor. But, with respect to legacies which took effect before the passing of the statute, the former law probably prevails, the ancient marital rights of the husband attach, and his receipt will be requisite to the valid discharge of the legacy.

It may be observed, in conclusion, that, by the former law, when a bequest was made to the separate use of a married woman, as where it was given "for her own use, and at her own disposal," she alone could give a good discharge for it. Her husband had no interest in the fund, and she might sue for it by her next friend.(d)

Of Interest upon Legacies.

Specific legacies are considered as separated from the general estate, and appropriated at the time of the testator's death; and, consequently, from that period, whatever produce accrues upon them, and nothing more or less, belongs to the legatees; therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator; and it is immaterial whether the enjoyment of the principal is postponed by the testator or not.(e)

Accordingly, it should seem that the specific legatees of cows, mares or ewes are entitled to the brood fallen between the death of the testator and the assent of the executor to the legacy. So, also, as to the wool of sheep shorn, &c.(f) But if inanimate and unproductive articles of property are bequeathed and not delivered, it does not follow that the legatee is entitled to interest upon their value, out of the estate, by way of recompense for the detention; if improperly withheld, the remedy is against the executor personally. The case of *Apreece v. Apreece*,(g) shows that a specific legacy (as a ring, where the value is fixed by the testator) does not carry interest.(h)

"General legacies in their nature carry interest; and, as in the case of all other claims with that incident, the interest is to be computed from the time at which the principal is actually due and payable.

"In the further consideration of the doctrine of allowing interest on general legacies, the subject may be regarded, first, in cases where the testator has not fixed any time of payment; secondly, in cases where the time of payment is named by him.

1st. When no time of payment is fixed, the executor is by law allowed one year from the testator's death to ascertain and settle his

(d) Wms. 1218, and cases cited; *Guild v. Peck*, 11 Paige, 475.

(e) Wms. 1221; *Parkinson v. Parkinson*, 2 Bradf. Surr. Rep. 77.

(f) Ib. 1021.

(g) 1 Ves. & B. 364.

(h) *Isehart v. Brown*, 2 Edw. Ch. Rep. 348. But see note to Wms. on *Exra*. 1021.

affairs; at the end of which time the court, for the sake of general convenience, presumes the personal estate to have been reduced into possession.⁽ⁱ⁾ Upon that ground, interest is payable from that time, unless some other period is fixed by the will; nor will interest be payable from an earlier date, although there is a direction in the will to pay the legacy 'as soon as possible.' If, indeed, a legacy is given in lieu of dower,⁽ⁱⁱ⁾ or is decreed to be a satisfaction of a debt, the court always allows interest from the death of the testator. A further exception to the rule exists in the case of a legacy given to a child by a parent, whether by way of portion or not; in which instance the court will give interest *from the death*, to create a provision for its maintenance. So, where a testator bequeaths a sum of money to an infant, and directs that his maintenance shall be paid out of the interest of that sum, the payment of interest will be allowed from the death, and not be postponed till the end of one year after."^(j)

This exception, however, is confined to legacies in favor of infants, and has never been extended to a legacy given to an adult.^(k) Nor does it apply to the case of a wife.^(l)

Again, a legacy to a child whose support and maintenance is otherwise provided for by the bounty of the testator, like a legacy to a more distant relative, or to a stranger, is not payable and does not draw interest until one year after the death of the testator, where no time of payment is prescribed by the will.^(m)

After the expiration of the year from the death of the testator, the legacy will carry interest, although payment be, from the condition of the estate, impracticable, and although the assets have been unproductive.⁽ⁿ⁾ And there is no exception on the ground of the legatee's not being in a situation to receive, or omitting to demand payment.⁽ⁿⁿ⁾ It is a general, settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months if there should at any time be a fund for the payment of them, and that in case the fund was productive within the twelve months, all the intermediate profits belong to the residuary legatee. The executor may pay the legacy within the twelve months, but is not compellable to do so. He is not to pay interest for any time within the twelve months, although during that time he may have received interest. But if he has assets, he is to pay interest from the end of the twelve months, whether the assets be productive or not.^(o)

An annuity bestowed by will, without mentioning any time of payment, is considered as commencing from the death of the testator, and the first payment as due at the expiration of one year; from which latter period interest may be claimed in cases where it is allowed at all.^(p)

(i) See *Hawley v. James*, 5 Paige, 318.

(ii) *Hepburn v. Hepburn*, 2 Bradf. Surr. Rep. 74.

(j) Wms. 1222, and cases cited.

(k) *Raven v. Waite*, 1 Swanst. 553.

(l) "*Street v. Robinson*, 12 Ves. 461;" Wms. on Exrs. 1222.

(m) *Williamson v. Williamson*, 6 Paige, 298.

(n) See Wms. 1223.

(nn) *Marsh v. Hague*, 1 Edw. Ch. Rep. 174.

(o) *Pearson v. Pearson*, 1 Scho. & Lefr. 10; Wms. 1224.

(p) See *Eyre v. Golding*, 5 Binney, 475.

The question whether a tenant for life of a fund is entitled to the interest of it from the death of the testator, or from the end of the year after his death, has been considered at a previous page.

"With respect to interest on general legacies, where the time of payment is fixed by the testator. The general rule is, that the legacies will not carry interest before the arrival of the appointed period; as, for instance, when the legatee shall attain twenty-one; nor will it make any difference that the legacy is vested.

"But this rule is subject to an exception in case of the testator being the parent (or *in loco parentis*) of the legatee. For there, whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy shall be allowed, as a maintenance, from the time of the death of the testator; *if there is no other provision for that purpose*. The court will determine the *quantum* of allowance, either the whole of the usual interest allowed by the court, or less, according to circumstances.

"Where the legatee is a child of the testator, and a specific sum is given by the will for maintenance, no greater allowance can be claimed for that purpose, although it be less than the usual rate of interest upon the legacy. But the court has in some cases increased the allowance, where it was insufficient for a reasonable maintenance, and where the legacy was vested.

"This exception is not extended in favor of nephews and nieces, nor of grandchildren,(*q*) unless the testator were *in loco parentis*.

"Where the payment of a legacy is postponed by the testator to a future period, as until the legatee attains twenty-one, and the will directs that when that period arrives the payment shall be made *with interest*, the legacy will bear interest only from the end of the year after the testator's death."(*qq*)

The legacy will generally, it is apprehended, carry interest at the full legal rate.

The interest on legacies is to be computed upon the principal only, and not upon the principal and interest. But under particular circumstances, the court will allow the legatee compound interest. As where there is an express direction in the will that the executor should lay out the fund to accumulate, and he neglects so to do.(*r*)

A legacy to an executor, it seems, will not carry interest.(*s*)

Of the Payment or Delivery of Specific Legacies.

With respect to the payment or delivery of specific legacies, although, as a general rule, it is well settled that a will of personal property relates to the time of the death of the testator, both as to the legatees and the subjects of the bequests mentioned in the will, yet, in the case of specific legacies, it is sometimes very difficult to ascertain whether he intended to confine the bequests to the subject matter thereof as it existed at the time of making the will, or as it might exist at the time

(*q*) *Lupton v. Lupton*, 2 Johns. Ch. Rep. 614.

(*qq*) Wms. 1226-7, and cases cited.

(*r*) Wms. 1230, and cases cited. See *post*, chap. 12.

(*s*) See *Morris v. Kent*, 2 Edw. Ch. Rep. 182; *Preston on Legacies*, 281.

when such will should take effect by his death. But to take the case out of the general rule, that in a will of personal estate, the testator is presumed to speak with reference to the time of his death, there must be something in the nature of the property or thing bequeathed, or in the language used by the testator in making the bequest thereof, to show that he intended to confine his gift to the property, or subject of the bequest, as it existed at the time of making the will.^(t)

Thus, where the testator directed by his will that his son should be discharged from all notes which he held against him, and from all charges made against him on book or otherwise, for loans or advances by the testator to or for him, and all claims against him for the occupation of, or rents by him received for two houses and lots in that clause of the will mentioned; and likewise released to his son-in-law all the moneys which the latter owed for moneys advanced to or for him, by the testator; it was held, that this provision in the will had reference to the state of the subject matter of the bequest as it existed at the time of the death of the testator, and that all debts, therefore, which were due from the son, or from the son-in-law, to the testator at the time of his death, and which answered the description contained in this clause of the will, were discharged, except as against creditors of the estate, who would have a right to resort to the same in case of a deficiency of other property to pay the debts.^(u) So if the bequest be general, as of all the testator's goods in a particular house or place, whatever personal chattels are found there at the time of his death will pass, though not there at the date of the will.^(v)

"However, if the testator shows a clear intention to dispose of such goods as belonged to him in a particular place at the date of his will, property afterwards brought there will not pass: as where the bequest is, 'of all such part of my personal property as is now in my house at _____,'

"It may be observed, that it is the duty of executors as far as possible, to preserve articles specifically bequeathed, according to the testator's wish; and unless compelled they ought not to apply them to the payment of debts."^(w)

And it may be further remarked, that it is also the duty of the executors to get in all the testator's estate, whether specifically bequeathed or otherwise; and that the expenses incurred in doing so must be paid out of the general estate, as part of the expenses of the administration.^(x)

"It may be added, that if a testator, dying solvent, bequeaths to A. a given number of articles forming part of a stock of articles of the same description, as for instance, if he has twenty horses in his stable and bequeaths six of them, the legatee, and not the executor, has the right of selection.^(y)

There has already been occasion to point out, that if a testator should

(t) *Van Vechten v. Van Veghten*, 8 Paige, 104.

(u) 8 Paige, 119.

(v) Wms. 1233.

(w) "*Clarke v. Ormonde*, Jacob, 105;" 2 R. S. 87, sec. 26; *ante*, p.

(x) "*Perry v. Meddowcroft*, 4 Beav. 204." Wms. 1235.

(y) "*Jacques v. Chambers*, 2 Coll. 435," Wms. 1235.

happen to direct his executor to deliver a specified packet, part of the property of the deceased, to a particular legatee unopened, the executor cannot, consistent with his duty, comply with this direction.(z)

Of Election.

The doctrine of election can only be so far treated of within the limits and design of this work, as to state briefly the nature of the subject and some of the leading principles established with respect to it.

"It is a principle of equity, that a person who accepts a benefit under an instrument, must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it. If, therefore, a testator assumes to dispose of property belonging to A., and devises to A. other lands, or bequeaths to him a legacy, by the same will, A. will not be permitted to keep his own estate, and enjoy at the same time the fruits of the devise or bequest made in his favor, but must *elect* whether he will part with his own estate, and accept the provisions of the will, or continue in the enjoyment of his own property, and reject that bequeathed.

"It is not requisite, for the operation of this principle, that the testator should be aware that the property, of which he so undertakes to dispose, is not his own. The obligation of making an election will be equally imposed on the legatee, although the testator proceeded on an erroneous supposition that both the subjects of the bequest were absolutely at his own disposal.

"It is necessary, however, that the intention of the testator to dispose of the property which is not his own, should be clear: the intention must appear by demonstration plain, by necessary implication. And it must appear, as it should seem, upon the face of the will: for it seems now to be established that parol evidence is inadmissible for the purpose of showing it.(a)

"The doctrine of election is applicable to interests, immediate, remote, contingent, of value, or not of value.

"It must, however, be observed, that the doctrine does not preclude a party claiming by the will from enjoying a derivative interest, to which he is entitled at law, under a legal estate taken in opposition to the will. Thus a man may be tenant by curtesy of an estate tail, held by his wife in opposition to a will under which he accepts a legacy.(b)

"Nor is that doctrine applicable as against creditors taking the benefit of a devise for payment of debts, and also enforcing their legal claim upon other funds disposed of by the will.

"Again, the doctrine of election is not applicable where real property is assumed to be devised by a will made by a person who is incapable, by reason of infancy or coverture, to devise real estate, and who, by the same will, valid as to personal estate, gives a legacy to the heir. In such a case the heir may take the legacy without making good the devise, unless the will contains an express condition to that effect annexed to the legacy."(c)

(z) See *ante*, chap. 7, p. 253.

(a) Wms. 1236-7, and cases cited; 2 Story Eq. Jur. sec. 1075 *et seq.*, chap. 30.

(b) Wms. 1237, and cases cited.

(c) Wms. 1238, and cases cited.

It is further necessary to consider the subject as applied to the case of a widow entitled to dower.

The Revised Statutes, part 2, chap. 1, title 3,(d) enact:

Sec. 1. A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage.

Sec. 12. If before her coverture, but without her assent, or if after her coverture, land shall be given or assured for the jointure of a wife, or a pecuniary provision be made for her in lieu of dower, she shall make her election whether she will take such jointure or pecuniary provision, or whether she will be endowed of the lands of her husband, but she shall not be entitled to both.

Sec. 13. If lands be devised to a woman, or a pecuniary or other provision be made for her by will, in lieu of her dower, she shall make her election whether she will take the lands so devised, or the provision so made, or whether she will be endowed of the lands of her husband.

Sec. 14. When a woman shall be entitled to an election under either of the two last sections, she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof.

"A testamentary provision for the wife is deemed a gratuity or benevolence, which she may take in addition to her dower, unless the testator has plainly manifested a different intention, as by saying that the gift is in lieu or bar of dower. Express words will not, however, be necessary, if the claim of dower is so utterly inconsistent with the terms of the will that the widow cannot have both gift and dower without breaking up the testator's plan of disposing of his estate. In such a case she may be put to her election. But the mere fact of devising lands to another, does not prove that the husband intended to bar dower in those lands. He may have intended that the devisee should take, subject to dower. It is not necessary that he should say so, because the law says it for him. So, if he direct the lands to be sold, and the proceeds to be distributed, that does not prove that he meant to bar dower. He may have intended that the purchaser should take, subject to the legal rights of the widow. Indeed, such is presumed to be his intention until the contrary appears. Dower is a legal right over which the husband has no direct control. He may offer something else in lieu of it, which, if accepted, will be a bar. But if he make a provision for the widow, either in lands or money, saying nothing about dower, the presumption is, that he intended it as matter of bounty." This doctrine will be found to be fully sustained by the cases and the authorities.(e)

Thus, in *Jackson v. Churchill*,(f) the widow was, by the will, provided with a house and garden, some furniture, a servant girl, and with some stock. One son of the testator was directed to keep the stock,

(d) 1 R. S. 740; 4th ed. (2d vol.) 149.

(e) See *Bull v. Church*, 5 Hill, 207, and cases and authorities cited.

(f) 7 Cowen, 287.

and the other to assist his mother, if she required it; but no means were given her to compel compliance, if refused. It was held that there was nothing in this provision inconsistent with the widow's claim of dower—that it constituted no objection that the property devised to the sons would be less valuable on account of her dower. “There was no incongruity,” it was said, “in enforcing the claim for dower and the devise; that the two might stand well together, and that it might fairly be inferred that the testator intended the devise as additional to his wife's claim for dower.”

So, in *Bull and wife v. Church*,^(g) where a testator devised all his real and personal estate to his wife during her life, or so long as she should remain his widow, with remainder to his children; and after his death the widow entered and occupied under the will for several years, and then married a second husband, it was held that she was entitled to dower.

The question may arise, what shall constitute a valid election by the widow.

Where the testator devised certain lands to his widow, and also bequeathed to her an annuity, in lieu of her dower in his real estate, and the widow, within two months after his death, executed a deed of relinquishment of the provisions made by the will, and elected to take her dower, and procured the deed to be recorded, and gave notice of such election to the testator's executors and trustees, who recognized her right to dower, and made payments to her out of the rents and profits of the estate on account of her dower, it was held that this was a valid election by the widow to take her dower, and was equivalent to an actual entry on the land, or the commencement of proceedings for the recovery of her dower, within the provisions of the Revised Statutes.^(h)

If a widow gives notice to the person who is in possession of the lands of which she is endowable, of her election to have her dower instead of the testamentary provision in lieu of dower, and such person thereupon admits her right, and voluntarily pays her a part of the rents and profits of the land, as and for her dower therein, it is in equity a valid election by her, and is equivalent to an entry on the lands, or an assignment of dower, for the purpose of determining such election.^(h)

It is not necessary, for the purpose of making a valid election by the widow, that she should make entry upon, or commence proceedings for the recovery of dower in every distinct parcel of the lands in which she is entitled to claim dower. It is sufficient if she has not accepted of the provision made for her in lieu of dower, that she actually commences proceedings, within the year, for the recovery or assignment of her dower in any part of the lands as to which her right of election exists; or that she enters upon any part of such lands, claiming her dower therein.^(h)

Where, however, the widow in the first place elected to take the provision made for her by the will in lieu of dower, and a purchaser of certain lands charged by the will with a contribution towards her support, which was a portion of that provision, refused to furnish the share with which that part of the lands was chargeable, it was held that the

(g) 5 Hill, 206.

(h) *Hawley v. James*, 5 Paige, 318.

widow could not then recover her dower in the lands. She might, it was said, have a remedy to compel a performance of the provisions of the will; but, by electing to receive that provision in lieu of dower, no action of dower could be maintained.(i)

The acceptance by a widow of an estate given to her by the will of her husband, *in lieu of dower*, is a bar *at law* as well as *in equity* to her right of dower in other lands whereof her husband died seised.(j)

To constitute a case of election under the Revised Statutes, the jointure or other provisions made for the wife in lieu of dower, must be a provision in which she has a beneficial interest; a mere power in trust for the sole benefit of others is not sufficient, although such power in trust is declared by the will of the testator to be in lieu of the widow's right of dower. But the testator may make the execution of a power in trust for the benefit of others, dependent upon the relinquishment by the widow of her right of dower in his real estate.(k)

Whether a mere charge of an annuity upon the lands subject to dower, with a clause of entry and distress, will be sufficient to put the widow to her election, is a question which has given occasion for much contrariety of decision, and is still unsettled.(l)

"Where a testator makes two bequests to the same person, one of which happens to be onerous and the other beneficial, the legatee will not be allowed to reject the one and retain the other.(m)

"The inquiry as to what acts or acquiescence constitute an implied election, must be decided rather by the circumstances of each case than by any general principle. The questions are, whether the parties acting or acquiescing are aware of their rights? whether they intended election? whether they can restore the individual affected by their claim to the same situation as if the acts had never been performed; or whether these inquiries are precluded by lapse of time?"

In *Leonard v. Crommelin*,(n) a father being entitled to a life estate in a certain lot of land in the city of New York, of which the remainder in fee was in his seven sons, several of whom were infants, sold the fee of the land to H., upon an understanding or stipulation of procuring the sons, who at the time were infants, to execute conveyances of their respective shares as they severally came of age. The father died possessed of a large estate, which, by his will, he devised to his sons as tenants in common, and to be divided between them when A., who was the youngest child, should arrive at lawful age, upon condition of their confirming the sale to H., and other similar sales which he had made. And he ordered and declared, in case either of his children should refuse or neglect to confirm the sales so made, that they should not be entitled to the proportion of his estate devised to them, but the same should be and remain as a security to the purchasers against the person or persons refusing to confirm the sale. A deed of release or conveyance was executed by five of the sons after they came of age, and delivered to H. One of the others died without having executed

(i) *Kennedy v. Mills*, 13 Wend. 553-6.

(j) 13 Wend. 553.

(k) Wms. 1242, and note.

(n) 1 Edw. Ch. Rep. 206.

(l) 5 Paige, 318.

(m) *Ib.* and cases cited.

such release. His surviving brothers were his heirs at law. A., the youngest son, after he came of age, took his share of his father's estate, concurring in selling parcels thereof, &c., and subsequently to the death of H., undertook to ratify and confirm the sale to him by executing the deed, and duly acknowledging the same; but, by reason of the previous death of H., it was inoperative as a release or conveyance of his title. Owing to this circumstance, he afterwards brought his action of ejectment for the purpose of being let into the possession and enjoyment of his original one-seventh part, and a derivative share of the one-seventh which had been vested in the brother who had died, and which the complainants held and claimed title to as the devisees of H.

It likewise appeared that the children had ratified one other sale which their father had made, of property situated in the city of New York, wherein they had the remainder in fee, and under circumstances in all respects similar to the sale to H., by executing deeds of release to the purchaser. The bill was filed to restrain perpetually the defendant, A., from proceeding in the action of ejectment, and to compel him to execute the release. And it was held that the execution and acknowledgment by A. of the deed to H., which proved ineffectual, by reason of the death of H., went far, in connection with other circumstances, to preclude the right of the defendant to set up a claim of title to the premises thus intended to be released; for, that it was fairly to be inferred that his object was to show a compliance with the conditions of his father's will, in order to vest in himself an absolute title to a share of his father's estate, and better enable him to dispose of the same. That the acts of A., in relation to a share of his father's estate, clearly showed his acceptance of the provisions of the will. The parcels of the estate which he concurred in selling could only have been held or claimed by him as a devisee, because he could not be permitted to take as heir, by descent, in the presence of an express valid devise. He was then bound to perform the condition annexed to the gift; and that although he might not have been bound unless he were cognizant of his rights, yet he could not then retract; because he could not then place the complainants (with respect to their rights) in the same situation which they would have stood in, provided his acts had not been performed.

The share of the father's estate devised to A., it was said, was pledged to the complainants as a security; and this security he had taken away, and could not restore. It would, consequently, be unjust towards them to permit a disaffirmance of his own act to their prejudice. If he had been deceived into a loss by the maladministration of his brother, which was alleged, or by any mistaken views of the value of the property devised to him, it was his misfortune. He was not bound to make his election until he could first ascertain the value of his patrimony; but, having made it, he was bound to abide by the determination, unless he could restore the property to its original situation.(o)

(o) 1 Edw. Ch. Rep. 211. See, also, *Edwards v. Morgan*, 13 Price, 782; *S. C.*, 1 M'Clel. 541, and on appeal, 1 Bligh's N. S. 401; *Spofford v. Manning*, 6 Paige, 383. In the case of the *Attorney-General v. Christ's Hospital*, (3 Bro. C. C. 165,) it was held, that where an estate is given upon a condition, the taking possession binds to the performance of it, although there be a loss.

A perpetual injunction was decreed.

"A party bound to elect, is entitled first to ascertain the value of the funds, and for that purpose may sustain a bill to have all necessary accounts taken; and election, under a misconception of the extent of claims on the fund elected, is not conclusive.

"Another subject of much doubt, with respect to the doctrine of election, has been, whether the election to take against the will induces the necessity of relinquishing the benefit given by it *in toto*, or only imposes an obligation to indemnify the claimants whom it disappoints; that is, as is sometimes expressed, whether the principle on which the doctrine of election proceeds is forfeiture or compensation. The more recent authorities are said to establish that compensation is only to be made."(*p*)

Of the Refunding of Legacies.

Under the Revised Statutes a case can hardly arise, excepting one of clear mistake, in which an executor can compel a legatee to refund a legacy. Previously to the Revised Statutes, if the executor paid away the assets in legacies, and *afterwards debts appeared*, of which he had no previous notice and which he was obliged to discharge, he might, by a bill, compel the legatees to refund.(*q*) And in compliance with a statute as has already appeared, legatees used to give security to the executor for refunding.(*r*) But now an executor cannot be called upon to pay a legacy until after the expiration of one year from the date of his letters;(s) within which year, by the publication of a notice pursuant to the statute,(t) he is enabled to ascertain all the debts for which the assets are liable, and after which publication, he is protected in any payments he may make to legatees against any claim not presented under the notice. If a claim be presented, and the executor disputes and rejects it, and the same is not referred, or an action is not brought thereon within six months after such rejection, the creditor is absolutely precluded from maintaining any action thereon;(u) and a creditor who has not presented his claim under the notice, has his remedy only against assets remaining in the executor's hands at the time of a suit brought on the claim, or against assets *in futuro*, or against the legatees, and in case resort is to be had to the legatees, it is the creditor who must bring the action.(v)

Legatees who have received their legacies, are liable to refund to a creditor, if he cannot collect his debt from the executors by reason of their having wasted or misapplied the assets, and become insolvent.(w)

Co-legatees, however, in no sense sustain to each other the relation

(p) Wms. 1243, and cases cited.

(q) See Wms. on Exrs. 1244.

(r) 1 R. L. 1813, 314, sec. 18; *Ante*, p. 407.

(s) 2 R. S. 90; 4th ed. 275-6; *Ante* p. 403.

(t) 2 R. S. 88; 4th ed. 274; *Ante*, p. 323, 347.

(u) 2 R. S. 89; 4th ed. 275; *Ante*, p. 324.

(v) 2 R. S. 90; 4th ed. 275; *Ante*, p. 325.

(w) *Stuart v. Kissam*, 2 Barb. Sup. Ct. Rep. 493, 512; *Lupton v. Lupton*, 2 Johns. Ch. R. 614. Legatees whose shares of the personal estate of the testator have been wasted by the executor, have no lien upon the real estate devised to such executor by the will, to make good their loss. *Wilkes v. Harper*, 1 Coms. 586.

of surety in respect to the testator's debts; each is liable only in proportion to the amount of his legacy.(x)

With respect to the liability of a legatee to refund, to make up a deficiency of another legatee, if an executor pays one legatee and there is afterwards a deficiency of assets to pay the others, the legatees so paid must refund a proportionable part. But if the deficiency of assets has been occasioned by the waste of the executor, the legatee who has been paid may retain the advantage he has gained by his legal diligence, as against his co-legatees, but not against a creditor.(y)

Of the Residuum and the Rights of the Residuary Legatees.

The right of the residuary legatee remains to be considered.

When an executor has paid all the debts and all the legacies heretofore mentioned, he must, in the last place, pay over the surplus or residue of the personal estate to the residuary legatee, if any such be nominated; and although the residuary legatee dies before the payment of debts, and before the amount of the surplus is ascertained, yet it shall devolve on his personal representative.(z)

It is, however, seldom found practicable to ascertain the exact amount coming to the residuary legatee or legatees, until the conclusion of the administration, and the final settlement of the affairs of the estate. The statute, as has been seen,(a) expressly requires the executor to discharge and pay the specific and general legacies at the expiration of a year from the time of his appointment, if there be assets; but, it will be observed, no such provision is made with respect to the disposition or distribution of the residuary personal estate. If, therefore, before the executor is prepared to render a final account of his proceedings, a residuary legatee apply for payment of his legacy, the executor will be justified in refusing to pay the claim in full, until the share to which the party is entitled has been definitively ascertained, by proper proceedings before a competent judicial tribunal.

"No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated.

"Where the residuary legatee is nominated generally, he is entitled in that character to whatever may fall into the residue after the making of the will, by lapse, invalid disposition, or other accident, or by acquirement subsequent to the date of the will."(b)

In *Van Kleeck v. the Reformed Dutch Church*,(c) Chancellor Walworth says: "A bequest of personal property, or of chattels real, which in

(x) *Wilkes v. Harper*, 1 Coms. 586. For the statutory provisions relative to the recovery from legatees of debts due by the deceased, see art. 2, title 3, chap. 8, part 3 of the Revised Statutes; 2d vol. p. 460; 4th ed. 692.

(y) *Lupton v. Lupton*, 2 Johns. Ch. Rep. 614.

(z) Wms. 1247.

(a) *Ante*, p. 404.

(b) Wms. 1044, and cases cited. See, also, *Floyd v. Ferris*, 1 Paige, 480; *James v. James*, 4 Ib. 117; *Van Kleeck v. The Reformed Dutch Church*, 6 Paige, 600; *King v. Woodhull*, 3 Edw. Chan. Rep. 82; *King v. Strong*, 9 Paige, 98, and cases cited; *Bowers v. Smith*, 10 Paige, 193; *Van Cortlandt v. Kip*, 1 Hill, 590; *Craig v. Craig*, 3 Barb. Ch. Rep. 76.

(c) 6 Paige, 607.

cases of intestacy belong to the next of kin, and do not descend to the heir at law, always refers to the state of the property at the testator's death. Hence, it is perfectly well settled, that a general residuary bequest of the personalty, includes everything which at the testator's death is not legally and effectually, as well as in terms, otherwise disposed of by the will. The general residuary clause, therefore, not only embraces reversionary and contingent interests in the personal estate, not fully and completely covered by other parts of the will, and which the testator does not attempt to dispose of, but it likewise comprehends any property or interests therein which is in terms bequeathed by other clauses in the will, but which for any reason eventually falls into the general residue. It of course includes legacies and bequests which become lapsed by events subsequent to the making of the will; and also those which were originally void, either on account of the illegality of the disposition which the testator attempted to make of his property, or because it was impossible for any other cause, that the bequest should take effect as he intended it.(d)

The foundation of this general rule in respect of lapsed legacies is, that the residuary clause is understood to be intended to embrace everything not otherwise effectually given: because the testator is supposed to take the particular legacy away from the residuary legatee, only for the sake of the particular legatee; so that, upon the failure of the particular intent, the court gives effect to the general intent.(e)

To entitle a residuary legatee to the benefit of a lapsed or void bequest, however, he must be a legatee of the residue generally, and not partially so; for where it is manifest, from the express words of the will, that a gift of the residue is confined to the residue of a particular fund or description of property, or to some certain *residuum*, he will be restricted to what is thus particularly given; since a legatee cannot take more than is fairly within the scope of the gift. But, to exclude what may fall by lapse or invalid disposition from the gift of the resi-

(d) "But it is otherwise," says the Chancellor, in *James v. James*, (4 Paige, 117,) "as to a residuary devise of real estate. For if a part of the real estate is specifically devised, and the devise does not take effect either from the incompetency of the devisee to take, from a partial revocation of the will, a lapse by the death of the devisee in the lifetime of the testator, or from the not happening of the contingency, upon which, as a condition precedent, the devise was made or was to take effect, it descends to the heir at law as property undisposed of by the will. *Wright v. Hall*, Fortesc. Rep. 182; *Watson v. Earl of Lincoln*, Amb. Rep. 325; *Gravenor v. Haltham*, Id. 645; *Greene v. Dennis*, 6 Conn. Rep. 293.

In respect to a residuary devise of real estate, the Chancellor in *Van Kleeck v. The Reformed Dutch Church*, (6 Paige, 608,) further says: "It has also been finally settled in England, although some doubt, perhaps, has been thrown upon the question by some of the decisions in this country, that a residuary devise of real estate, or of all the testator's estate not before disposed of in his will, carries with it not only the real estate in which no interest is devised in the previous part of the will, but also every reversionary and contingent interest, which, in the events contemplated by the testator, as apparent from the will itself, is not wholly and absolutely disposed of, and which would be a proper subject of devise consistently with the declared intent of the testator.

The decision of the court in *James v. James*, the Chancellor says, in *Bowers v. Smith*, (9 Paige, 202,) was not intended to impugn the general principle, that a residuary devise of real estate carries to the devisee not only the real estate of the testator which has not been devised to others, but also reversionary and contingent interests in the estate specifically devised; which interests, in the events contemplated by the testator, were not otherwise wholly and absolutely disposed of by his will.

(e) "*Easum v. Appleford*, 5 M. & Cr. 61, 62;" Wms. 1251.

due—as it may be supposed that the testator did not intend to die intestate as to any portion of his property when he set about making a will, and is supposed to exclude the residuary legatee only for the sake of the particular legatee, the law requires that he should use very special words, clearly limiting the gift of the residue, and showing in express terms an intention to exclude such portions of his estate as may fail to pass under previous clauses of the will, in order to take it out of the general rule above stated.(f)

Again, the testator may, by the terms of the will, so circumscribe and confine the residue, as that the residuary legatee, instead of being a general legatee, shall be a specific legatee, and then he shall not be entitled to any benefit accruing from lapses, unless what shall have lapsed constitute a part of the particular residue.(g)

From the cases on this subject, it will be seen that in considering a residuary clause in a will, the court will look at the context to ascertain, not so much whether it was the intention that the residuary legatee should take the benefit of a lapsed bequest, (for it may be argued, in most cases, that the testator does not mean that the residuary legatee should take what is previously given from him, for he does not contemplate the case,) but whether the words used are so strong and expressive, as necessarily to exclude property which falls in by lapse, and to limit the bequest of the residue to a particular residue, instead of permitting it to read as a general residuary bequest.(h)

Where the residuary estate is bequeathed to several persons in *joint tenancy*, if one or more of them happen to die in the lifetime of the testator, or after his death, but before the severance of the joint tenancy in the residue, their shares will survive to the others. But if the residue be given to several as *tenants in common*, the shares of the deceased shall not go to the survivors, but shall devolve on the testator's next of kin, according to the Statute of Distributions, as so much of the personal estate remaining undisposed of by the will, in case the death happened in the lifetime of the testator; or shall go to the personal representatives of the deceased legatee, in case his death took place after that of the testator.(i)

In *Marsh v. Wheeler*,(j) the testator gave a residue to his five sons, "to be equally divided between them, share and share alike," one of the sons died before such residue became distributable, and it was held, that the share of the deceased son did not go to his surviving brothers. "The bequest," it was said, "is not to them in joint tenancy. There are no words of survivorship; and when distinct legacies are given to individuals, or an aggregate fund is directed to be divided among them in equal shares, their interests are several, and if any of them die before the shares are vested, what was intended for them will fall into the residue: because the benefits intended for the deceased legatees are not

(f) *King v. Woodhull*, 3 Edw. Ch. Rep. 82; 2 Rop. on Leg. 457; *Bland v. Bland*, 2 Jack. & W. 404, 406. Instances of limited gifts of the residue are found in *Davers v. Dewes*, 3 P. Wms. 46, and in *The Attorney-General v. Johnston*, Amb. 577.

(g) Wms. 1252.

(h) 3 Edw. Ch. Rep. 83.

(i) Wms. 1253, and cases cited; *Floyd v. Barker*, 1 Paige, 480.

(j) 2 Edw. Ch. Rep. 156.

given over to the survivors.^(k) Hence, in the case of a joint tenancy, the death of one will not occasion a lapse, but, in the other, such an event, under certain circumstances, will defeat the legacy or share (of the deceased) in the aggregate fund."

Formerly it was the rule at law, that the whole personal estate devolved on the executor; and if, after payment of the funeral expenses, testamentary charges, debts and legacies, there was any surplus, it would vest in him beneficially. And in equity, *prima facie*, the rule was the same as at law. The numerous cases upon the subject must be considered as having established the general rule, that the executor, by the mere force of the appointment, should take all the undisposed of residue of the personal estate, as well beneficial as legal. But this general rule was controlled in equity, in all cases where a necessary implication or strong presumption appeared, that the testator meant to give only the *office* of executor, and not the beneficial interest in the residue. In all such cases, the executor was considered a trustee for the next of kin of the testator; or in cases where no next of kin could be found, as trustee for the crown.^(l)

But now, by statute,^(m) where there is a will, the surplus remaining after the payment of the debts and legacies, if not bequeathed, is to be distributed to the widow, children, or next of kin of the deceased, in the same manner and in the same proportions as is directed for the distribution of the surplus distributable in cases of intestacy, and the executor, in his mere capacity of executor, takes nothing.

In disposing of the residuary estate, whether to legatees or to persons entitled in distribution, the executor will have the right to retain a sufficient balance in his hands to pay future expenses of the estate, and to await a distribution upon a final settlement of his accounts.

The remedies for enforcing the disposition or distribution of the residuary estate have been, as the reader will have observed, in several instances already adverted to. The provisions of the statutes authorizing the surrogate to allow advances on account of legacies or distributive shares before the expiration of the year,⁽ⁿ⁾ extend, as will have been noticed, to the present case. The residuary legatee or person entitled in distribution, may also take proceedings to obtain a decree for payment of the residuary estate, or of a share thereof, under the 18th section, 2 R. S. 116, repeatedly before referred to, authorizing the surrogate to decree payment of a legacy or distributive share, after the year has elapsed from the time of the grant of the letters to the executor. The practice under these provisions heretofore given,^(o) applies in every particular to the remedy with respect to the residuary estate. Such legatee or person entitled, may also bring a suit at law or in equity, against the executor for the recovery of the residuary estate, or his share of the same. The court will, however, without doubt, in either of these proceedings, allow such retention above spoken of, upon a proper representation by the executor of its necessity, if the

(k) *Page v. Page*, 2 P. Wms. 489.

(l) *S. v. Wms.* on Exrs. 1263.

(m) 2 R. S. 96, sec. 75; 4th ed. 281.

(n) See *ante*, p. 404-5.

(o) See *ante*, p. 342 *et seq.*

time for the final settlement of his accounts has not arrived at the period of the decree or judgment.

After eighteen months have elapsed from the date of his letters, the executor may be called upon to account before the surrogate at the instance of any person interested in the personal estate, either as legatee, residuary legatee, or in any other character, and to dispose of and distribute the assets remaining in his hands, under the provisions of the statutes above quoted, regulating the rendering and settling of the accounts of executors and administrators. Those provisions are contained in a separate article of the statutes, and in conformity with the arrangement there observed, and which has been heretofore followed in these pages, as has been already mentioned, form the subject of a distinct and future branch of this work. To avoid any repetition, the consideration of the practice on compelling the disposition or distribution of the residuary estate under the provisions in question, is therefore omitted in this place; and the reader is referred to that branch of this treatise for the requisite instructions applicable to such proceedings. Provision will there also be found for allowing the executor, under proper circumstances, to retain a portion of the assets in his hands to meet contingent liabilities.

The subject of distribution is named in the title of the present chapter.

The office of an administrator, as far as it concerns the collecting of the effects, the making of an inventory, and the payment of debts, is altogether the same as that of an executor. But as there is no will (except the administration be *cum testamento annexo*) to direct the subsequent disposition of the property, at this point they separate, and must pursue different courses.

In several instances the remedy for ascertaining distributive shares and compelling payment, either in part or in whole, has been above pointed out, in connection with the discharge and payment of legacies. A person entitled in distribution, as was shown, (p) may, under the order of the surrogate, obtain an advance on account of his share, before the expiration of a year from the grant of the administration, if the same be necessary for his support, and he prove that there is at least one-third more of assets than will be sufficient to pay all claims then known; after the year has elapsed, it has also appeared, (q) the surrogate may decree payment of a distributive share against an administrator, on the application of any person entitled. The sections of the statutes governing the recovery of distributive shares by actions at law against administrators have been given. And it may here be added, that the Supreme Court, by virtue of its equity powers, likewise has jurisdiction over administrators to compel distribution. The provisions of the statutes regulating the rendering and settling of the accounts of executors and administrators, as has already been intimated, and will hereafter fully appear, also afford a remedy for ascertaining and enforcing the payment of distributive shares. In proceeding against him, it is to be observed, the administrator will have the same right as an executor under the

(p) *Ante*, pp. 404-5.

(q) *Ante*, p. 485.

like circumstances, to retain a portion of the assets to meet future contingent liabilities of the estate.

It remains to consider the portion of the personal property due to each distributee.

That subject can, however, be more conveniently discussed in connection with a subsequent head of this treatise. The share of the personal property of an intestate, or where there is a will not bequeathing a part of such property, of the residue so undisposed of, payable to each person entitled in distribution, is prescribed in that article of the statutes containing the provisions regulating the rendering and settling of the accounts of executors and administrators. In conformity with the arrangement heretofore observed in this work, the further consideration of the subject is therefore to be included in that part of this work where those provisions are treated of. Those provisions, as will be seen, furnish an ample and adequate remedy for the recovery of distributive shares. That remedy is the one most frequently resorted to in practice; and the reader, it is believed, will find the postponement for the present of the further consideration of the subject in question, consistent with the order which experience and the course of proceedings in conducting the administration would suggest.

It is proper, however, to observe in this place, that there is no provision with respect to the payment of distributive shares by administrators similar to that requiring the executor to discharge and pay specific and general legacies, after the expiration of a year from the time of his appointment. The means are afforded as has appeared, for ascertaining and enforcing payment of distributive shares, but such payment is not distinctly imposed upon the administrator as a duty. The surplus remaining in the administrator's hands after the payment of the debts, is to be regarded in the same light as the residuary estate remaining in the hands of an executor. The administrator may, therefore, properly refuse to pay a distributive share in full, unless under the order of the court. If he have assets in his hands, applicable to the payment of distributive shares, and be satisfied of the title of the person claiming as distributee, he may make a payment on account, but he will be right in withholding a sufficient proportionable part, with reference to subsequent expenses and liabilities of the estate, and to await a distribution, on a final settlement of his accounts.

CHAPTER XII.

EXECUTORS' ACCOUNTS.

OF COMPELLING EXECUTORS AND ADMINISTRATORS TO RENDER ACCOUNTS IN THE SURROGATES' COURTS; OF THE RENDERING AND SETTLING OF SUCH ACCOUNTS; OF ENFORCING THE PAYMENT OF CLAIMS ON SUCH SETTLEMENTS; AND OF THE DISTRIBUTION OF THE ASSETS REMAINING IN THE EXECUTOR'S OR ADMINISTRATOR'S HANDS, INCLUDING NUMEROUS PARTICULARS OF THE EXECUTOR'S OR ADMINISTRATOR'S LIABILITY BY REASON OF HIS OFFICE, AND A COMPLETE VIEW OF THE SUBJECT OF THE DISTRIBUTION OF THE SURPLUS IN CASES OF INTESTACY.

THE payment of claims of every description against the personal estates of deceased persons, may be enforced by proceedings before the surrogate, under the provisions of the statutes requiring and regulating the rendering and settling of accounts by executors and administrators. And those are the provisions usually resorted to by creditors, legatees and next of kin, for the collection of their claims; although, as has been seen, (a) the eighteenth section of the act concerning "the rights and liabilities of executors and administrators," (aa) authorizing the surrogate to decree payment of debts, legacies and distributive shares against executors and administrators after the expiration of a year from the time of the granting of their letters, affords a very effectual remedy. Executors and administrators, however, not being by the last mentioned section expressly required to render an account under oath, and having, in many instances, reasonable excuses for not being prepared, after only a year from the time of their appointment, to meet every demand against their decedents' estates, claimants seldom avail themselves of the remedy which its provisions may furnish. The preliminary steps to obtain the decree under that section not being distinctly pointed out by the statute, the practice under it, also, has been supposed to be attended with some embarrassments.

Eighteen months having elapsed from the time of the appointment of the executor or administrator, he can be compelled, at any rate, to render an account of his proceedings in the discharge of his trust; and, having rendered an account, the surrogate will, upon application, make such order in the case as shall be just and equitable. The residuary legatee, or the person entitled as next of kin, as has been already intimated, (b) as well as a claimant in any other capacity, has, after the eighteen months have expired, a more certain and ample remedy against the executor or administrator than is afforded at any previous period of the administration. It has been seen (c) that a creditor who has obtained a judgment against the executor or administrator, otherwise than after a trial at law upon the merits, must resort for the consummation of his remedy to the provisions now to be considered.

(a) *Ante*, chap. 10.

(aa) 2 R. S. 116; 4th ed. 298.

(b) See *ante*, p. 442-3.

(c) *Ante*, chap. 10.

The executor or administrator, also, after eighteen months from the time of the granting of his letters have expired, may voluntarily produce before the surrogate an account of his proceedings, and after due notice to the parties interested in the estate, may require the same to be judicially examined and settled, and procure a decree confirming or correcting such disposition of the property of the estate as he may have made, and directing him in the legal distribution of any which may still remain in his hands.

The distribution by administrators of the surplus remaining after the payment of the debts, in cases of intestacy, also will be treated of in the present chapter, together with the subject of the rendering and settling of the accounts of executors and administrators, in pursuance of the plan which has been adopted in this work, of following, as nearly as may be, the arrangement of the Revised Statutes; the provisions for such distribution being contained in the same article of the statutes with those respecting the accounting.

Statutory Provisions.

The following are the sections of the statutes which relate to the accounting by executors and administrators. They also prescribe many of the powers, liabilities, rights and conditions incident to the office of executor or administrator. They are for the most part contained in the third article of the third title of the sixth chapter of the second part of the Revised Statutes.

Sec. 52. An executor or administrator, after the expiration of eighteen months from the time of his appointment, may be required to render an account of his proceedings, by an order of the surrogate, to be granted upon application from some person having a demand against the personal estate of the deceased, either as creditor, legatee or next of kin; or of some person in behalf of any minor having such claim, or without such application.(d)

Sec. 76. When a surrogate shall make an order under the above 52d section, requiring an executor or administrator to render an account of his proceedings, the same shall be served upon such executor or administrator by showing him the original, and at the same time delivering him a copy thereof, or in case of his absence from home, by leaving a copy thereof with his wife, or some suitable person, at the place of his residence, thirty days at least before the time of hearing. But if such executor or administrator shall not reside within this state, the order shall be served by publishing it once in each week, for three months before the return day thereof, in the state paper, and also in the county paper where the surrogate resides who issued the order, if any such paper there is published in said county, and if not, in the county paper of some adjoining county, unless the order be personally served on such executor or administrator, and if it shall be personally served on any such executor or administrator residing out of the state at the time of service, such service shall be made at least sixty days before the return day thereof.(e)

(d) 2 R. S. 92; 4th ed. 277.

(e) S. L. 1837, 537; 2 R. S. (4th ed.) 277.

Sec. 53. Obedience to such order may be enforced in the manner hereinbefore directed, to compel the return of an inventory; and in case of disobedience, the same proceedings may be had, to attach the party so disobeying, and to discharge him. And the like revocation of the letters granted to him may be made, in case of the party's absconding or concealing himself, so that the order cannot be personally served, or of his neglecting to render an account within thirty days after being committed; and new letters shall be granted with like effect as in those cases.^(f)

Sec. 1. Whenever an absent or non-resident executor or administrator shall have been duly cited to appear and account before the surrogate, in pursuance of the above 52d section, and the citation shall have been duly served in the manner prescribed by law, and such executor or administrator shall, without showing reasonable cause, neglect or refuse to appear, in pursuance of said citation, the surrogate issuing such citation may, in his discretion, thereupon make an order, revoking the letters testamentary or letters of administration before granted to such executor or administrator, reciting therein the cause of such revocation; and shall grant letters testamentary or of administration of the goods, chattels and effects of the deceased unadministered, to the person entitled thereto, (other than such executor or administrator,) in the same manner as original letters of administration, or letters testamentary, with the like effect as is provided in the twentieth and twenty-first sections of title third, chapter six, part second of the Revised Statutes, where an executor or administrator has neglected or refused to return an inventory.^(g)

Sec. 54. In rendering such account, every executor or administrator shall produce vouchers for all debts and legacies paid, and for all funeral charges, and just necessary expenses; which vouchers shall be deposited and remain with the surrogate. And such executor or administrator may be examined on oath touching such payments, and also touching any property or effects of the deceased which have come to his hands, and the disposition thereof.

Sec. 55. On the settlement of an account of an executor or administrator, he may be allowed any item of expenditure, not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own oath, positively to the fact of payment, specifying when and to whom such payment was made, and if such oath be uncontradicted; but such allowances shall not in the whole exceed five hundred dollars, for payments in behalf of any one estate.^(h)

Sec. 56. The surrogate may make allowance to any executor or administrator for property of the deceased perished or lost without the fault of such executor or administrator.

Sec. 57. No profit shall be made by executors or administrators by the increase, nor shall they sustain any loss by the decrease, without their fault, of any part of the estate; but they shall account for such

^(f) 2 R. S. (4th ed.) 278.

^(g) S. L. 1846, chap. 238, p. 381; 2 R. S. (4th ed.) 264, sec. 58.

^(h) 2 R. S. 92; 4th ed. 278.

increase, and shall be allowed for such decrease, on the settlement of their accounts.⁽ⁱ⁾

The "act to authorize executors and administrators to compromise and compound debts due to their testators or intestates," provides as follows:

Sec. 1. Executors and administrators may be authorized by the surrogate, or the officer authorized to perform the duties of surrogate, in the county where their letters testamentary or of administration were issued, on application, and good and sufficient cause shown therefor, and on such terms as said surrogate or officer shall approve, to compromise or compound any debt or claims belonging to the estate of their testator or intestate.^(j)

Sec. 2. Nothing in this act contained shall prevent any party interested in the final settlement of said estate from showing, on the final settlement of the accounts of said executor or administrator, that such debt or claim was fraudulently or negligently compromised or compounded.^(j)

Sec. 58. On the settlement of the account of an executor or administrator, the surrogate shall allow to him for his services, and if there be more than one, shall apportion among them, according to the services rendered by them respectively, over and above his or their expenses.

1. For receiving and paying out all sums of money, not exceeding one thousand dollars, at the rate of five dollars per cent.

2. For receiving and paying any sums exceeding one thousand dollars, and not amounting to five thousand dollars, at the rate of two dollars and fifty cents per cent.

3. For all sums above five thousand dollars, at the rate of one dollar per cent.; and in all cases such allowance shall be made for their actual and necessary expenses, as shall appear just and reasonable.^(k)

Sec. 59. Where any provision shall be made by any will for specific compensation to an executor, the same shall be deemed a full satisfaction for his services, in lieu of the allowance aforesaid, or his share thereof, unless such executor shall, by a written instrument to be filed with the surrogate, renounce all claim to such specific legacy.

Sec. 60. If, upon being required by any surrogate to render an account, an executor or administrator desires to have the same finally settled, he may apply to the surrogate for a citation, which such surrogate shall issue, requiring the creditors and next of kin of the deceased, and the legatees, if there be any, to appear before him, on some day therein to be specified, and to attend the settlement of such account.^(l)

Sec. 61. The citation shall be served personally on all those to whom it shall be directed, living in the county of the surrogate, at least fifteen days before the return thereof; and upon those living out of the county, or who, or whose residence may be unknown, either personally, fifteen days previously, or by publishing the same in a newspaper printed in the county, at least four weeks before the return thereof,

(i) 2 R. S. 93; 4th ed. 278.

(j) S. L. 1847, 88; 2 R. S. (4th ed.) 273.

(k) 2 R. S. 93, as amended by ch. 160 of Laws of 1849; S. L. 1849; 2 R. S. (4th ed.) 278.

(l) 2 R. S. 93; 4th ed. 278.

and in such newspapers printed in any other counties, where any creditors or other persons interested in the estate of the deceased may reside, as the surrogate, upon due inquiry into the facts, shall direct.^(m)

Sec. 62. If there be any such creditors, or other persons interested, residing in any other state of the United States, or in either of the provinces of Canada, the citation shall be published once in each week for three months, in the state paper, unless such citation be personally served on such creditors, at least forty days before the return thereof; and if there be any such creditors, or other persons interested, residing out of the United States, and out of the provinces of Canada, the citation shall be published as aforesaid for six months.⁽ⁿ⁾

Sec. 63. Any creditors, legatees, or other persons interested in the estate of the deceased, as next of kin or otherwise, may attend the settlement of such account, and contest the same; and they, and the executor or administrator, shall have process, to be issued by such surrogate, to compel the attendance of witnesses.

Sec. 64. The hearing of the allegations and proofs of the respective parties may be adjourned from time to time, as shall be necessary. And the surrogate may appoint one or more auditors to examine the accounts presented to him, and to make report thereon, subject to his confirmation; and may make a reasonable allowance to such auditors, not exceeding two dollars per day, to be paid out of the estate of the deceased.

Sec. 65. The final settlement of such account, and the allowance thereof by the surrogate, or upon appeal, shall be deemed conclusive evidence against all creditors, legatees, next of kin of the deceased, and all persons in any way interested in the estate, upon whom the said citation shall have been served, either personally or by publication, as herein directed, of the following facts and of no others.

1. That the charges made in such account for moneys paid to creditors, to legatees, to the next of kin, and for necessary expenses, are correct.

2. That such executor or administrator has been charged all the interest for moneys received by him, and embraced in his account, for which he was legally accountable.

3. That the moneys stated in such account as collected, were all that were collectable on the debts stated in such account, at the time of the settlement thereof.

4. That the allowances in such account, for the decrease in the value of any assets, and the charges therein for the increase in such value, were correctly made.^(o)

Sec. 72. [Sec. 66.] Any trustee created by any last will or testament, or appointed by any competent authority to execute any trust created by any such last will or testament, or any executor or administrator with the will annexed, authorized to execute any such trust, may, from time to time, render and finally settle his accounts before the surrogate of the county in which such last will or testament was

^(m) 2 R. S. 93; 4th ed. 279.

⁽ⁿ⁾ Ib. 94; 4th ed. 279.

^(o) 2 R. S. 94; 4th ed. 279.

proved, in the manner provided by law for the final settlement of the accounts of executors and administrators; and may, for that purpose, obtain and serve in the same manner the necessary citations, requiring all persons interested to attend such final settlement, and the decree of the surrogate on such final settlement may be appealed from in the manner provided for on an appeal from a decree of a surrogate on the final settlement of the accounts of an executor or administrator, and the like proceedings shall be had on such appeal. The final decree of the surrogate on the final settlement of an account, provided for in this section, or the final determination, decree or judgment of the appellate tribunal, in case of an appeal, shall have the same force and effect as the decree or judgment of any other court of competent jurisdiction on the final settlement of such accounts, and of the matters relating to such trust, which shall have been embraced in such accounts, or litigated or determined on such settlement thereof.(p)

Sec. 70. An executor or administrator, after the expiration of eighteen months from the granting of letters testamentary or of administration, may render a final account of all his proceedings to the surrogate who appointed him, although not cited to do so, and may obtain a citation to all persons interested in the estate, to attend a final settlement of his accounts; which citation shall be served and published in the manner prescribed in the preceding sections of this title, and thereupon the same proceeding shall be had for a final settlement, and with the like effect, in all respects, as in the case of a settlement at the instance of a creditor.(q)

Sec. 2. The surrogate shall file the accounts of administrators, executors and guardians rendered before him, and shall record with his decree a summary statement of the same, as the same shall be finally settled and allowed by him, which shall be referred to and taken as part of the final decree.(r)

Sec. 71. Whenever an account shall be rendered and finally settled, under any of the preceding sections, if it shall appear to the surrogate that any part of the estate remains to be paid or distributed, he shall make a decree for the payment and distribution of what shall so remain to and among the creditors, legatees, widow and next of kin to the deceased, according to their respective rights; and in such decree shall settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share, to whom the same shall be payable, and the sum to be paid to each person.

Sec. 72. In such order the surrogate may, upon the consent in writing of the parties who shall have appeared, direct the delivery of any personal property which shall not have been sold, and the assignment of any mortgages, bonds, notes, or other demands not yet due, among those entitled to payment or distribution, in lieu of so much money as such property or securities may be worth, to be ascertained by the appraisement and oath of such persons as the surrogate shall appoint for that purpose.(s)

(p) S. L. 1850, 587; 2 R. S. (4th ed.) 279.

(q) Ib. 95; 4th ed. 280.

(r) S. L. 1837, 524; 2 R. S. (4th ed.) 420, sec. 13.

(s) 2 R. S. 95; 4th ed. 281.

Sec. 73. Every person to whom any such securities may be assigned may sue and recover upon the same, at his own costs and charges, in the name of the executor or administrator making such assignment, or otherwise, in the same manner as such executor or administrator might have done.^(t)

Sec. 74. If, upon the representation of an executor or administrator or otherwise, it shall appear to the surrogate that any claim exists against the estate of the deceased, which is not then due, or upon which a suit is then pending, he shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained for the purpose of being applied to the payment of such claim when due, or when recovered, or of being distributed according to law. The sum so retained may be left in the hands of the executor or administrator, or may be directed by the surrogate to be deposited in some safe bank, to be drawn only on the order of the surrogate.^(t)

Sec. 57. Where, by any last will, a sale of real estate shall be ordered to be made, either for the payment of debts or legacies, the surrogate in whose office such will was proved, shall have power to cite the executors in such will named, to account for the proceeds of the sales, and to compel distribution thereof; and to make all necessary orders and decrees thereon, with the like power of enforcing them as if the said proceeds had been originally personal property of the deceased, in the hands of an administrator.^(u)

As the principal purpose in view is to point out the practice in the Surrogate's Court, on compelling an executor or administrator to render and settle his account, and on the final settlement of the accounts of executors and administrators, those of the foregoing sections of the statutes which prescribe the course of proceedings on compelling such account, and on such settlement, are to be chiefly considered; and those defining the duties, rights and responsibilities of executors and administrators, are to be treated of only so far as they are necessarily connected with the adjustment and settlement of the account. The distribution of the surplus, in cases of intestacy, will form a principal subject of consideration after the examination of these provisions shall have been concluded.

Of compelling an Executor or Administrator to account in the Surrogate's Court.

It is proposed, in the first place, to point out the practice on compelling an executor or administrator to render an account. The settling and allowing of an account, whether rendered in obedience to a surrogate's order, or voluntarily, by the executor or administrator, will next be treated of.

Who may compel an Account.

By the above section, numbered 52, an executor or administrator may be compelled to account, after the expiration of eighteen months

(t) 2 R. S. 96; 4th ed. 281.

(u) 2 R. S. 109; 4th ed. 295.

from the time of his appointment, upon the application of any person having a demand against the personal estate of the deceased, either as creditor, legatee, or next of kin, or of some person in behalf of any minor having such claim, or without such application.

The section plainly requires that a person, to be entitled to the order to account, should have a demand or possess an interest in one of the prescribed capacities. It is apprehended that, consequently, such interest ought to be shown to the surrogate, before he should grant the order to render an account. As in the case of compelling the return of an inventory, however, an interest, or even the appearance of an interest, is sufficient in the first instance to entitle the party to the order; and it is usually issued without any particular inquiry as to the claim of the applicant. In the directions now to be given for the preparation of the petition for an account, this point will, notwithstanding, be distinctly regarded, because it is believed that at least a partial inquiry, in the first instance, respecting the interest of the petitioner, is required by the true construction and intention of the statute.

It is proper to observe that, strictly by the words of the section, the widow, as such, cannot compel the personal representative of her deceased husband to account—she not being a person having a demand against the personal estate in the requisite capacity. She is, however, clearly within the equity and spirit of the section, and, beyond all doubt, an account may be decreed upon her application.

Of the Petition for an Account.

The order requiring the executor or administrator to render an account, as has been intimated, is obtained on the petition of the claimant to the surrogate. The statute says the order shall be granted on the application of the party, but the practice is to require a written petition to be filed. The language of the section, as it prescribes certain capacities in which an account may be demanded, contemplates, it is above intimated, the necessity that the surrogate should take some proof of the requisite interest in the claimant, before granting the order upon the executor or administrator. It is proper that such proof should be reduced to writing, and the form of a petition for the order has been adopted, as conformable to the practice in similar cases in other courts. In order that such proof may be judicially reliable, it should be under oath. The petition should therefore be sworn to. The proof so furnished by the petition, and the granting of the order thereon, are not, however, conclusive as to the right of the party to demand an account, and that question may yet be raised by the executor or administrator on the return of the order.

The petition should contain the proper averments to show jurisdiction in the surrogate, and should state the date of the appointment of the executor or administrator, the interest of the petitioner, and every fact and circumstance which will go to establish his claim, and the liability of the executor or administrator to account and make payment. For the last purpose, if within the knowledge of the petitioner, he may, for instance, allege abundant assets and the discharge of all prior claims. It should set forth, also, that the petitioner has duly requested an ac-

count and payment of his claim, since the expiration of eighteen months from the time of the appointment of the executor or administrator, and that the executor or administrator has neglected or refused to comply with such request; and unless such request has been made and refused, and is alleged in the petition, or proved on the part of the petitioner, on the hearing of the matter, although an account and payment may be decreed, the petitioner ought not to be allowed to have any costs or expenses of the proceeding charged against the estate or the executor or administrator. Even where the executor or administrator has neglected to advertise for creditors to exhibit claims, a creditor should make a demand for payment before asking for an account, because it may be that his claim would have been paid, and the accounting, therefore, at his instance, needless. It has been held, as was intimated in a previous chapter, (v) and as will hereafter more particularly appear, that the surrogate has not jurisdiction, on an accounting before him, to determine the validity or amount of a disputed debt against the estate. A creditor, therefore, it would seem, if he seek payment of his claim in case of contest before the surrogate, should show that his claim has been either assented to by the executor or administrator, or duly established against him by competent adjudication, and should state such assent, or the prosecution and establishment of his claim, by a reference pursuant to the statute, or otherwise by a judgment or decree, in his petition for an account. As a general rule, however, if a creditor swears positively to a debt due to him from the decedent, he will be entitled to an order for an inventory and an account of the estate. (w) A legatee should set forth in his petition the will of the deceased, or fully and distinctly refer to the provisions of the same under which he claims. A person petitioning as next of kin, will of course assert his degree of relationship to the deceased, as that is the foundation of his demand. Even a contingent interest in the estate is sufficient to entitle the party having such interest to an order that the executor or administrator render an account; (x) and a petition presented by a creditor to a surrogate, praying for an order requiring executors to render an account, is sufficient if it states that the petitioner is a creditor of the deceased, and, as such, has claims against the estate of the testator; although it does not in terms specify that the claims are against the *personal* estate. (xx) Where the legacy or distributive share belongs to a married woman, and not to her husband, the husband and wife should both join in the petition, so that the accounting may be binding upon the wife as well as upon her husband, and so that the proceedings could be continued in her name, if her husband should happen to die before the final decree. (y) Other statements and charges proper to be included in the petition, may be gathered from the directions heretofore given with respect to petitions for obtaining a decree for payment of a debt, or of a legacy or distributive share, after the expiration of a

(v) Chap. 10, ante p. 346; *In the Matter of the Estate of John Kent*, Law of Surrogates, (1st ed.) Appendix, p. vii.

(w) *Per* Walworth, Chancellor, 1 Barb. Ch. Rep. 489.

(x) *Ib.*

(xx) *Wever v. Martin*, 14 Barb. 376.

(y) *Westervelt v. Gregg*, 1 Barb. Ch. Rep. 478; See, also, *Guild v. Peck*, 11 Paige, 475.

year from the time of the appointment of the executor or administrator, under the 18th section of the act concerning "the rights and liabilities of executors and administrators,"(yy) above referred to.

No persons besides the executor or administrator need be made parties to the proceeding. By the above section, numbered 60, the executor or administrator may, when ordered to account, bring in other parties in interest to attend to their rights in the premises. The prayer of the petition should be for a decree for payment of the claim as well as for an account, as the surrogate is authorized to make a decree for payment both by the above mentioned 18th section, which provides for such decree after the expiration of a year from the time of the granting of the letters, and by the above section, numbered 71,(z) which requires him, whenever upon the rendering and settling of an account of an executor or administrator any part of the estate remains to be distributed, to make a decree for the due payment and distribution thereof. (For form of petition, see Appendix, No. 62.)

If the applicant, in his petition to the surrogate, do not ask for the payment of his debt, or legacy, or distributive share, but merely ask that the executor or administrator may render an account, the rendering of the account by the executor or administrator will fully comply with the prayer of the petition, and the jurisdiction of the surrogate under the same, except for the purpose of examining the executor or administrator, under oath, according to the statute, will be exhausted. The party can have no further relief under that petition. No settlement of the account can properly be made in such a case, without presenting a new petition to the surrogate for the settlement and adjustment of the account, and the payment of the claim of the petitioner.(a)

Of the Order to Account.

On presenting and filing the petition, the order to render an account is made.(b) It must be entered in the surrogate's minutes. It requires the executor or administrator to appear before the surrogate on a day not less than thirty days distant, and render an account of his proceedings in the performance of the duties of his trust, and show cause why he should not pay the debt due to the petitioner, if the petitioner be a creditor, or if he be a legatee or one of the next of kin, why he should not discharge the legacy or pay the distributive share of the petitioner. (For form of the order, see Appendix, No. 63.)

By the above mentioned 52d section, the executor or administrator is to be required to render an account by an *order* of the surrogate, and the above section, numbered 76, from the law of 1837, speaks of "an *order* requiring an executor or administrator to render an account;" but, in other places, as in the above section, numbered 1, of the act of 1846, the process to compel an account is called a *cikution*. In the court of the surrogate of the county of New York, the first process for

(yy) 2 R. S. 116; 4th ed. 298; See *ante*, p. 342, 344.

(z) 2 R. S. 95; 4th ed. 81; *Ante*, p. 450.

(a) See *Westervell v. Gregg*, 1 Barb. Ch. Rep. 478; *Smith v. Van Kewen*, 2 Barb. Ch. Rep. 473; *Campbell v. Bruen*, 1 Bradf. Surr. Rep. 224.

(b) But see *Gratacap v. Phye*, 1 Barb. Ch. Rep. 485.

the purpose has always been an order. In other counties a citation has been issued, and there is no difficulty in framing a citation to meet the case. The practice of issuing an order is, without doubt, strictly correct, and it is submitted, in view of the terms of the section expressly authorizing the proceeding, is to be preferred to that by citation. In the Appendix, however, will be found forms of the order for the citation, and of the citation to be used where the latter practice prevails. (See Appendix, No. 63.) The observations hereafter to be made, in which the process is referred to by the name of an order, it will be understood, apply as well to cases in which the proceeding has been by citation.

The order must be served upon the executor or administrator at least thirty days before the day appointed for the hearing, by showing the original and delivering a copy, or otherwise, as is prescribed by the above section, numbered 76, S. L. 1837, 537. In order to expedite the proceedings, it will prove useful to serve a copy of the petition at the same time with the order upon the executor or administrator, as otherwise, on the return day, he may set up ignorance of the claim and of the contents of the petition, and demand further time to enable him to answer the allegations of interest made by the claimant, or to prepare any other defence which he may assert to exist, against the application or the right of the petitioner to call him to an account.

Of the Proceedings on the Return of the Order.

If the executor or administrator fail to appear on the day appointed, after proof of personal service of the order, a further order is issued against the executor or administrator, reciting briefly the previous proceedings, and requiring him to show cause at a short day why an attachment should not issue against him for his disobedience of the order to account, and the proceedings in such case are, by the above section, numbered 53, the same as those on disobedience to a summons to return an inventory, heretofore treated of.^(c) The surrogate will not grant an attachment on any other than personal service of the order.

If the service has been made by delivering the copy to the wife of the executor or administrator, or to a suitable person at his residence, on proof of such service, an order, requiring his appearance and an account at a short day, or attachment is usually granted, upon which, if personally served and disobeyed, the claimant may have an attachment. The provisions of the statutes respecting the service of the order and the subsequent proceedings thereon, will be found not easily reconcilable in practice in all cases; but the almost universal case is that of an executor or administrator residing in the county of the surrogate, or in this state, and for such the practice to be pursued is prescribed with sufficient clearness, and the remedy afforded is certain and adequate. For the purposes of this work, the case supposed is that of a resident executor or administrator.

The practice and forms for proceedings on the revocation of the letters of an absent or non-resident executor or administrator, in the case

(c) See *ante*, ch. 7.

specified in the above section of the act of 1846, may be gathered from the practice and forms for proceedings on the similar revocation for not returning an inventory, described and indicated in the previous chapter of this work, where the subject of compelling the return of inventories is treated of, and the provisions of the Revised Statutes mentioned in the closing portion of the section, will also be there found considered.(d)

On the return day of the order, if the claimant neglect to appear, the executor or administrator may have the matter dismissed. Upon the appearance of both parties the hearing is proceeded with. The questions before the surrogate, on the return of the order, may be: first, the right of the petitioner to demand an account from the executor or administrator; and second, if an account has been rendered in pursuance of the order, the correctness and justness of the same, or of any item or items thereof.

If the claimant is not satisfied to rest his case upon the statements and charges contained in his petition, he is not precluded, before the commencement of the investigation, from putting in a further written allegation or libel, more fully propounding or stating the substance of his claim against the defendant, and the nature and grounds thereof. If his petition and such allegation be insufficient, and show no grounds for proceedings against the defendant, the court may be called upon to reject the same; or the defendant may take issue on the facts propounded; or put in a counter allegation in the nature of a plea in bar. Until some issue is joined in the cause, neither party can be prepared to go into the examination of testimony.(e)

If the petitioner claim as a legatee or as next of kin, his identity or his title as a distributee may be disputed. In any case the executor or administrator may defeat the application, by showing that the supposed claim of the petitioner is unfounded, or has been paid or discharged. And there may be other grounds of defence which the executor or administrator may take against the right of the petitioner to an account at all, which, if proved, will cause the petition to be dismissed, and that with costs.

It may be said that, notwithstanding the claimant may not make out a title to demand an account, yet the executor or administrator is bound to render one, because the statute authorizes the surrogate to order him to render an account without any application for the purpose. And where infants are concerned, it is indeed, probably, the duty of the surrogate, after a reasonable time has elapsed for the settlement of the estate, to call the executors or administrators to account without application by any one, especially if he has reason to apprehend that the interest of the minors requires such an *ex officio* proceeding.(f)

And this is the reason why strict proof of interest in the claimant is not required in the first instance on the application for the order. It is granted, that in the case of a proceeding on the part of the surrogate,

(d) See *ante*, chap. 7.

(e) *Flister v. Wilber*, 1 Paige, 540.

(f) *Smith v. Lawrence*, 11 Paige, 211.

of his own motion, the executor or administrator could not maintain any objection to rendering an account. But where it appears that the party calling for the account is a mere volunteer, having no interest in the estate, it is supposed that he ought not to be encouraged in harassing the executor or administrator, by compelling a needless accounting, and that there would be something like an improper officiousness in the surrogate's stepping into his place and adopting his proceedings as if they had been originally commenced *ex mero motu*. It was accordingly before urged that the surrogate should require some proof of the interest of the claimant in the estate of the deceased previously to issuing the order to account, and it is now submitted, that where it is shown that the claimant is not entitled to an account, his petition should be dismissed, and he should be charged with all the costs and expenses of the proceedings.(g)

It is not usual to require the exhibition of an inventory or account, unless at the intervention of a party in interest.(h)

But an interest, or even the appearance of an interest, as has already been stated, the same as in the case of compelling the return of an inventory, will entitle the party to an account. Therefore, a person petitioning as a creditor may have an account, although his debt has not been assented to by the executor or administrator, or established by judgment or decree, and even where the debt is contested, if it be sworn to by the creditor, unless the executor or administrator show that his claim is utterly unfounded.(i) The surrogate, however, according to the decision before alluded to,(j) cannot proceed to determine the validity or amount of the debt, and consequently such creditor will not be able to obtain a decree for payment. And a party having an interest, who prays an account, shall not be chargeable with costs unless he makes objections to it which he fails to substantiate.(k)

The principles heretofore laid down in respect to the rights of the parties on compelling the executor or administrator to return an inventory,(l) apply, it is proper to state, in every particular to the rights of the same parties on compelling an account. To avoid a repetition, therefore, the reader is referred to that part of this work, for the rules to be observed in the present proceeding.(m)

(g) See *Gratacap v. Phylle*, 1 Barb. Ch. Rep. 485.

(h) *Thomson v. Thomson*, 1 Bradf. Surr. Rep. 24.

(i) *Thomson v. Thomson*, 1 Bradf. Surr. Rep. 24.

(j) *In the Matter of the Estate of John Kent*, Dayton's Surrogate, 1st ed. Appendix vii. See *supra*, p. 453; *Infra*.

(k) 4 Burn E. L. 429, 8th edit.

(l) *Ante*, ch. 7.

(m) The mode of proceeding thus described for compelling an executor or administrator to render an account in the Surrogate's Court, is the one now pursued in the Court of the Surrogate of the county of New York, and such has been substantially the practice of that court since the adoption of the Revised Statutes. Some unimportant variations in the practice in these cases, will be observed, between that described in the former and that described in the present edition of this work. In *Gratacap v. Phylle*, (1 Barb. Ch. Rep. 485,) Chancellor Walworth was of opinion, however, that except in the case where the surrogate requires an account *ex officio*, an order absolute that the executor or administrator render an account, ought not to be made in the first instance, and, that where there is an application for an account by or on behalf of a person interested in the estate, the surrogate should preliminarily issue a citation to the executor or administrator, to show cause at an early day, why he should not be required to render an account; upon the return of which, if cause was not shown, an

The pendency of a suit in equity in the Supreme Court or any other court of record, by one creditor for an account, if the suit has not proceeded to a decree, is no bar to a proceeding instituted before the surrogate by another creditor for an account. But if the same creditor who has brought a suit in such court in equity against the executor or administrator for an account, afterwards cites him to account before the surrogate, the pendency of the suit in equity may be set up before the surrogate, in the nature of a plea in abatement, and will constitute a valid objection to the proceedings there. After a decree for an account has been made in the equity suit, for the benefit of all persons interested in the estate of the decedent, such decree will deprive every such person of the right to proceed before the surrogate for an account.⁽ⁿ⁾

order to account might be granted. And the learned Chancellor makes the following observations on the subject: "The statute authorizes the surrogate to make an order after the expiration of eighteen months from the time of the appointment of the administrator, that he render an account of his proceedings. And such an order may be granted upon the application of a person having a demand against the personal estate of the decedent, as creditor, legatee, or next of kin, or in behalf of a minor having such claim; or it may be made by the surrogate *ex officio*, without any such application. The proceedings, however, are entirely different where the order is made by the surrogate *ex officio*, from what they are when it is made upon an application in behalf of a person interested as a creditor, or as a legatee, or as the next of kin of the decedent. In the first case, it may, perhaps, sometimes be proper for the surrogate to make an absolute order in the first instance, as it is a matter resting in the discretion of the surrogate whether he will or will not require an account of the administration of the estate, although no person interested thinks proper to institute a suit for that purpose. And it undoubtedly is a proper exercise of such discretion, for the surrogate to require such an account *ex officio*, whenever, in his opinion, the rights of minors who are interested in the estate as legatees or next of kin, render such an account proper. *Roberts v. Roberts*, 2 Lee's Eccles. Rep. 399.

"On the rendering of such an account, if it appears that the administrator has in his hands money belonging to infants, the surrogate should notify the guardians or relatives of such infants of the fact; so that the fund may be received and properly invested for the benefit of those to whom it belongs.

"But in the case of an application by, or in behalf of a person claiming to be interested in the estate as a creditor, legatee, or as the next of kin of the decedent, an absolute order to account should not be made in the first instance, and without notice of the application to the administrator. For in such cases the right of the applicant to call for an account may be questioned. The surrogate, therefore, upon the presentation of the petition for account, should direct the administrator to be cited to appear at a specified time, and to show cause why an order that he render an account of his proceedings, should not be granted; so as to give him an opportunity to object that the affidavit of the debt of the applicant is insufficient, or that such applicant is not interested in the estate as a legatee or as next of kin, &c. And the party cited may show in answer to the application, that the right of the applicant to an account is barred by a release, or otherwise." See *Millington v. Sorsby*, 1 Lee's Eccles. Rep. 525.

With great deference it is submitted, that the 52d section of the statute authorizes and requires the surrogate to grant the order to account against an executor or administrator, to any person applying in the requisite capacity, and that a citation to appear and show cause is neither directed nor authorized by the statute. By the practice of the New York Surrogate's Court, and as proposed in the text before granting the order to account, the surrogate requires in the petition, such a statement, under oath, of the facts and of the nature of the petitioner's claim, as *prima facie* entitles him to an account, but the granting of the order has never been considered conclusive of the right of the party to demand, or of the liability of the executor or administrator to render such account, and upon the return of the order the executor or administrator is permitted to traverse the allegations of interest on the part of the petitioner, and to contest his right to demand an account; and if it appear that the petitioner has not the right, the order to account is discharged and the petition is dismissed. This practice has been found by experience conducive to the ends of justice. It is supposed to be based upon the express provisions of the statute, and not to be objectionable for any of the reasons suggested by the Chancellor.

(n) *Rogers v. King*, 8 Paige, 210.

A surrogate has no jurisdiction to call the personal representatives of a deceased executor to account before him as the representatives of the first testator, when none of the effects of such testator came to their hands in that character.

But upon the application of a person who, as a legatee or distributee of the first testator, is a creditor of the deceased executor, the surrogate has authority to call the representatives of the latter to account for the estate of their own testator or intestate; and upon such accounting the surrogate is authorized to liquidate and determine the amount of the claim against the estate of such testator or intestate as the representative of the first testator.(o)

Where S. bequeathed his personal estate to his son, J. W. S., and made L. executor of his will, and J. W. S., the son, subsequently died, having appointed L. and three other persons his executors, it was held that the fact that the executor of the father was also one of the executors of the son, was not a valid objection to the jurisdiction of the surrogate to cite him to account, upon the application of his co-executors, under the will of the son; and that the co-executors of L., under the will of the son, had a right so to cite L. to account before the surrogate, as the executor of S., to enable them to ascertain the amount due from him to their testator, under the will of S., the original testator.(p)

Of the Form of the Account; and of the Vouchers.

The right of the claimant to demand an account being admitted, or having been established, the executor or administrator must forthwith file his account with the vouchers thereof. The account to be rendered is, as directed by the statute, an account of the proceedings of the party as executor or administrator. It should consist of a debit and credit account of his receipts and disbursements by reason of his office, and in the performance of the duties of his trust, with a summary history of his transactions in the administration.(q) It should comprise, also, such statements respecting the disposition which he may have made of any of the property of the estate, or respecting his proceedings in the administration generally, as it may concern him to lay before the surrogate either in explanation of any of the items of his debit and credit account, or in answer to the allegations contained in the claimants' petition, or to any objections which may have been raised to any part of his conduct as executor or administrator. (For form, see Appendix, No. 66.) By the above section, numbered 54, vouchers must be produced for all disbursements and expenditures. Such vouchers must be deposited and remain with the surrogate, and the executor or administrator may be examined on oath touching his payments, and touching any property or effects of the deceased which came into his hands, and the disposition thereof. By the 55th section, the executor or administrator may be allowed any item of expenditure not exceeding \$20, for

(o) *Dakin v. Demming*, 6 Paige, 95.

(p) *Smith v. Lawrence*, 11 Paige, 206. See, also, *Wurts v. Jenkins*, 11 Barb. Sup. Ct. Rep. 546.

(q) The account may also very well be made out in the form to be found in the Appendix, No. 68, for an account voluntarily rendered by an executor or administrator.

which no voucher is produced, provided it is supported by his oath, and such items do not, in the aggregate, exceed \$500.

Of the Executor's Oath to the Account.

The account should be duly verified by the oath of the executor or administrator. When an executor or administrator is called upon to account before the surrogate, he is bound to verify the account by his oath or affidavit, stating in substance that such account contains, according to the best of his knowledge and belief, a full and true account of all his receipts and disbursements on account of the estate of the decedent, and of all sums and property belonging to the estate which have come to the hands of such executor or administrator, or which have been received by any other person by his order or authority for his use; and that he doth not know of any error or omission in the account, to the prejudice of any of the parties interested in the estate of the decedent. And if he wishes to be allowed for payments and disbursements of \$20 and under, for which he is unable to produce proper vouchers or other evidence, he must specify in his account the times when, the persons to whom, and the purposes for which the several payments or disbursements were made; and he must add to his affidavit a positive allegation that the said several sums have been actually paid or disbursed by him, as charged in the account. But this general affidavit will not authorize the allowance of any items exceeding twenty dollars, if the same is disputed, without the production of the proper vouchers showing the expenditure of the money, or other legal evidence of its payment.^(r) The statute makes the oath of the executor or administrator evidence in his own favor as to certain small items of disbursement, and to a limited amount. Beyond those, the oath of the executor or administrator, to the correctness of the account, is not evidence in his own favor. But for the protection of the rights of parties interested in the estate, as creditors, legatees or otherwise, the surrogate should, in all cases, require the account to be rendered under oath.^(s) (For form of the oath, see Appendix, No. 67.)

Of the Proceedings on the Accounting.

It often occurs that an executor or administrator, at the time he is ordered to account, has not advertised for claims pursuant to the statute, and formerly, on the ground that, by reason of this omission, the claims against the estate were not ascertained, and consequently the amount due the petitioner could not be determined, it was the practice in the court of the surrogate of the county of New York, in such a case, to allow an adjournment, which, where the advertisement had not been commenced, was of six months, to enable the executor or administrator to publish the requisite notice, and he was not obliged to bring in his account until the expiration of such extended period. The claimant was thus hindered in the just prosecution of his demand, because the exec-

^(r) *Williams v. Purdy*, 6 Paige, 167.

^(s) *Westervell v. Gregg*, 1 Barb. Ch. Rep. 469.

utor or administrator had not seen fit to perform the duty, or rather to avail himself of the protection of advertising for claims.

This practice does not any longer prevail in the New York Surrogate's Court. There is, perhaps, as has heretofore been observed,^(t) some indistinctness in the statute relative to advertising for claims, but in the Surrogate's Court named, it is considered that the section authorizing the publication of the notice, was intended solely for the benefit and protection of the executor or administrator: and that after the time for advertising has expired, the neglect to advertise ought not to be allowed to operate to the delay or injury of persons having honest claims against the estate. The publication of the notice is regarded as entirely optional with the executor or administrator. If he thinks proper to neglect it, such neglect is held as a virtual admission that he has knowledge, as is generally actually the case of all the claims against the estate. He is therefore required, after the eighteen months have expired, on the petition of a claimant, asking for an account and for payment of his claim, to produce his account immediately, and to pay an admitted or established demand, the just proportion appearing from the account, to which it may be entitled. There may be cases in which the omission to advertise may be a sufficient ground for adjourning the proceedings against the executor or administrator, but in such cases an account up to the period of the order must be brought in, and it must be made to appear that such omission has not been intentional or for the purpose of delay, that the application for an adjournment for the purpose of advertising for claims is in good faith, and that there is reason to believe that there are claims against the deceased for which the assets in the hands of the executor or administrator are liable, which have not been brought to his notice, and in such a case the executor or administrator is chargeable personally with all the costs and expenses occasioned by the adjournment, as a penalty for his non-performance of his proper duty.

An account having been rendered, either on the return day of the order, or after an adjournment, and the vouchers having been filed, and the executor or administrator having been examined, if the petitioner has omitted to ask for payment of his claim or for the settlement of the account, but merely prayed an account, the jurisdiction of the surrogate under the petition is exhausted, and the proceeding here closes. In such a case the creditor, legatee or distributee, if he seek payment of his claim, must make a new application to the surrogate, stating the nature and extent of his own claim upon the fund, and his objections, if any, to the account rendered by the executor or administrator, and asking that the account may be settled and adjusted, and that he may be paid the amount of his claim, or so much thereof as he may be entitled to out of the fund in the hands of the executor or administrator.^(u) If the petitioner has asked for both the account and payment, or the settlement of the account in his original petition, or a new application having been filed, the proper proceedings are to be

(t) *Ante*, ch. 10.

(u) *Westervelt v. Gregg*, 1 Barb. Ch. Rep. 469; *Smith v. Van Keuren*, 2 Barb. Ch. Rep. 473. See, also, *Campbell v. Bruen*, 1 Bradf. Surr. Rep. 224; *Bogart v. Van Velsor*, 4 Edw. Ch. Rep. 721. See *supra*, p. 454.

had to ascertain the correctness of the account. The claimant may allege objections against the account, or any of the items thereof. The executor or administrator himself, and witnesses on either side, may be examined touching the property or effects of the deceased, and the disposition thereof. Adjournments of the proceedings may take place, and a reference to an auditor may be had, pursuant to the above section, numbered 64.(v) If, after due inquiry, there appears a balance in the hands of the executor or administrator, applicable to the payment in full or in part of the petitioner's claim, the surrogate will at once decree a full or proportionable payment as may be just.

An executor or administrator, on being ordered to account, at the instance of a claimant, will frequently demand a final settlement of his accounts, according to the provisions of the above section, numbered 60. If there be a deficiency of assets, or if any difficulty exist as to making payments or distribution, it is reasonable that he should insist, before satisfying any particular claimant, that the share of all the claimants should be determined and fixed, and himself protected in the discharge of his trust, by the decree of a competent judicial tribunal, which may be effected by bringing all the parties before the surrogate, to attend a final settlement of his accounts. Where the executor of the father was also one of the executors of the son, and he was ordered to account as executor of the father upon the application of his co-executors of the son, it was considered that upon being thus ordered to account, he could have a final settlement of his accounts as executor of the father in the same manner, as if he had been ordered to account by the son in his lifetime.(w) On such final settlement every question is involved which can be raised on an accounting at the instance of a single claimant.

The practice on an investigation into the account rendered on the application of a claimant, is above summarily stated. The course of investigation, and the proceedings on the examination of the executor or administrator, and of witnesses, and on a reference to an auditor, which are presently to be fully described in a case of a final settlement of an account, are to be exactly followed in the case of an accounting prosecuted by a single claimant. It is proposed, therefore, to defer any farther or more particular directions or remarks respecting the account of an executor or administrator, or the oath to be annexed thereto, or the subsequent proceedings thereon, until they come to be treated of in connection with a case of a final accounting. This arrangement is deemed expedient, not only because precisely the same principles apply to both accountings, but because it will render this work conformable in its plan, in this respect, to the usual course of proceedings, and save the necessity of any repetition, at the same time that every particular material to the due understanding of the subject is included.

(v) A question has been raised, whether the authority to appoint auditors extends to this case. The provision of the statute seems to apply only to the case of an accounting, after the executor or administrator has brought all the parties in interest before the surrogate.

(w) *Smith v. Lawrence*, 11 Paige, 206.

Of the Final Settlement of the Accounts of Executors and Administrators.

The final settlement of the accounts of executors and administrators comes now to be treated of. Such settlement may be accomplished, pursuant to the above section, numbered 60, where the executor or administrator has already been ordered to account, or the account may be voluntarily produced, under the above section, numbered 70.

There are two classes of cases in which the surrogate may proceed to settle the account after it has been rendered; the first, where a creditor, legatee or distributee, asks for payment of his demand, and the executor or administrator denies the sufficiency of assets, thereby rendering it necessary, before ordering payment, to adjust his account, and ascertain the amount of the fund; and the second, where the executor on being cited to account or without being cited, applies to the surrogate for a final settlement. The first settlement is conclusive between the parties only, and is therefore not final in a full sense; the second is between all the parties interested in the estate, and is properly final.(x)

The final settlement of the account, under the provisions of the statutes, is intended for the benefit and protection of the executor or administrator,(y) and to release him from all further or subsequent liability, by reason of his administration of the property which has been committed to his care. The finality intended by the term final settlement, refers to the conclusive character of the accounting, which being made on citation to all parties in interest, is a final and conclusive adjustment up to that period.(z) Proceedings for the purpose of such final settlement, should be so conducted as effectually to bar all future claims against the executor or administrator, in consequence of the trust which he had undertaken to discharge. In the practice to be pursued on the settlement of an executor's or administrator's account in the Surrogate's Court, especial reference, therefore, is to be had to the object of rendering such settlement conclusive upon all parties interested in the personal estate of the deceased.

By the above section, numbered 60, an executor or administrator who has been ordered to account, if he desire to have his account finally settled, may have a citation, requiring the creditors and next of kin of the deceased, and the legatees, if there be any, to appear before the surrogate, on some certain day, and attend the settlement of such account. By the above section, numbered 70, an executor or administrator, after the expiration of the eighteen months, may render a final account of all his proceedings to the surrogate, although not cited to do so, and may obtain a citation, to all persons interested in the estate, to attend a final settlement of his accounts. The proceedings under the two sections are alike. In treating of the final settlement, therefore, no distinction will be made between the two cases.

There is no provision in the statutes which prevents an executor or

(x) *Campbell v. Bruen*, 1 Bradf. Surr. Rep. 226-7. See, also, *Guild v. Peck*, 11 Paige, 275.

(y) *Bank of Poughkeepsie agt. Hasbrouck*, 2 Selden, 224.

(z) *Glover v. Holley*, 2 Bradf. Surr. Rep. 291. See, also, *Bank of Poughkeepsie agt. Hasbrouck*, 2 Selden, 216.

administrator from obtaining a final settlement of his accounts, because he has not filed an inventory or advertised for claims against the estate.

Of the Petition for a Final Settlement.

The application to the surrogate for the citation under either the 60th or 70th section must be made in writing. It should contain the proper statements to show jurisdiction in the surrogate, and should set forth that eighteen months have expired since the granting of the letters testamentary or of administration, and that the party has been ordered to account, if such has been the fact, and should pray a citation pursuant to the one or the other section, according as the application is made after an order to account, or the account is voluntarily produced. If the party be executor or administrator with the will annexed, he may properly set out the will at large in his application, as well for convenience of reference in the course of the proceedings, as that the same may become permanently a portion of the record in that particular matter. It is usually required that the names and residences of the creditors and other persons interested in the estate be stated in the application, but this is not expressly required by the statute. It can be essential only where there are persons interested in the estate residing in other counties of the state, and it is proposed to advertise the citation in such counties pursuant to the succeeding 61st section. And then the names and residences of such persons only would seem to be necessary. In such cases as the publication of the citation, according to the 61st section, is to be made in such newspapers printed in any other counties, where any creditors or other persons interested in the estate of the deceased may reside, as the surrogate, upon due inquiry into the facts shall direct, the names and places of residence of the creditors or other persons interested residing in such other counties may properly be included in the application, and as the due inquiry which the surrogate is to make would probably have to be under oath, the application should be sworn to. Its prayer also should be for the necessary directions for publication as well as for the citation. In other cases, there would seem to be no necessity for stating the names or residences of the persons interested or for swearing to the application. (For forms of application adapted to both the 60th and the 70th sections, see Appendix, No. 64.)

The language of the above section, numbered 60, clearly contemplates, and that of the section, numbered 70 expressly requires, that before taking out a citation for the settlement of his account, the executor or administrator should render his account to the surrogate. The 60th section speaks of the executor or administrator desiring the settlement of an account and applying for a citation for a settlement of such account, which plainly intends an account already made out and in existence, and produced before the surrogate. Different words would have been used if the account referred to were one yet to be prepared. In analogy to any other legal proceeding, the party is to be held to state his case at the outset. The section, likewise, has reference to the preceding 52d section, 2 R. S. 92,(a) requiring the executor or admin-

(a) See *supra*, p. 446.

istrator to render an account on an order of the surrogate, and supposes a compliance with such an order. The 70th section says, that the executor or administrator may render his account and obtain a citation, which plainly means that the rendering of the account is to precede or accompany the obtaining of the citation. By this construction of these sections, they enable persons interested in the estate to examine and compare the accounts and vouchers at the surrogate's office before the return day of the citation, and thus to be prepared on the hearing to assent or object to the account. It is just that facilities for that purpose should be afforded as well before the hearing as at that time, and these sections, if this construction be the correct one, manifestly provide such facilities. In this view they are calculated also to expedite the proceedings.

It may be observed that the application to the surrogate for a citation under the 60th section, is nowhere made a stay of the proceedings on the order to account, which has been previously taken out by the claimant. The executor or administrator, it is true, may, after having been served with the order, apply before the return day of the same, for a citation for a final settlement; but the order remains in full force, and its requisition is equally imperative, whether such application be made or not. The filing of the account and vouchers at the time of the application for the citation, will so far be a competent answer to the order; and they may, of course, be used on the hearing of the matter on the day named in the order for rendering of the account. If, from such account, there appear to be a balance in the hands of the executor or administrator, and the claimant show that he is entitled to the same, or a portion thereof, there can certainly be no objection to a decree for payment immediately. If he detect in the account any mistaken, unjust or dishonest entries or statements, there can be no good reason why he should not be allowed to go into proofs respecting the same, and have the facts settled and the balance adjusted and fixed. The final settlement is for the benefit and safety of the executor or administrator. The rights of the claimant ought not to be impeded by it. When, however, the questions between the claimant and the executor or administrator involve the interests of other parties entitled to share in the personal estate, the proceedings will have to be stayed until such parties have been duly brought before the court to be heard in the matter.

But the practice in the court of the surrogate of the county of New York has been, not to require the account or vouchers to be filed until the return day of the citation for a final settlement, whether the account is to be rendered in obedience to an order, or is produced voluntarily. The executor or administrator who has been ordered to account in that court, appears at the surrogate's office on the return day of the order, and without producing any account, files an application for a citation for a final settlement. The surrogate thereupon issues the citation, and adjourns the accounting until the return day of the citation. That return day, according to the above sections, numbered 62 and 63, depends upon the places of residence of the persons interested in the estate. If any of those persons reside in foreign countries, by the 63d section, it may be six months distant, and the adjournment

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of the accounting for that period must take place. In this way these provisions of the statute relative to the final accounting, which are intended solely for the protection of the executor or administrator, are made an obstruction and hindrance to the prosecution of the just claims against the estate. It is usual, where the executor or administrator applies for the citation after having been ordered to account, to require some proof that there are non-resident parties in interest before granting so long a delay. It is necessary, therefore, in such cases, that the names and residences of the persons interested in the estate, residing abroad, should be stated in the application for the citation, and that it should be under oath.

Of the Issuing and Service of the Citation for a final Settlement.

On filing the application the citation issues.

The citation, under the 60th section, is to be directed in cases of intestacy, to the creditors and next of kin, and if there be a will, to the same description of persons, and to the legatees under the will also. Under the 70th section, it runs to all persons interested in the estate. Whether the direction is to be to the persons by name, or whether it may be general, is not distinctly declared by the statute. The above section, numbered 61, speaks of the service of the citation on all those to whom it shall be directed, living, &c., but this is not necessarily to be understood as requiring the persons to be cited by name. Either form is, without doubt, proper. The general citation, however, is the one usually adopted.

It may be noticed that the widow, as such, is not among the persons required to be cited by the 60th section, but under the section numbered 63, she may contest the account as a person interested in the estate, and by the 65th section, the settlement of the account is conclusive as therein prescribed, upon any person interested only in case the citation has been duly served upon him. The executor or administrator, therefore, will not do well if he omit serving the widow with the citation. It should be drawn so as to include her among the persons to whom it is directed. She is clearly within the language of the 70th section, and in proceedings under that section must be served with the citation, the same as any other person interested in the estate.

An order for the issuing of the citation must be entered in the surrogate's minutes, which may authorize the issuing of the citation to be directed to the creditors, &c., or persons interested, either by name or generally, but the particular manner ought to be specified, and if it be intended to set out in the citation the names of the persons to whom it is directed, they should be given in the order. If directions be made for publication of the citation in another county, such directions, also, may be included in the order.

(For forms of the order and of the citation, see Appendix, No. 65.)

The above sections, numbered 61 and 62, prescribe the mode of service of the citation.

The extent and sufficiency of the protection afforded to an executor or administrator by a settlement of his accounts before the surrogate, depends entirely upon his accuracy in ascertaining the names and resi-

dences of the persons interested in the estate, and his diligence in serving all such persons with the citation to attend the accounting. By the above section, numbered 65, the settlement and allowance of the account by the surrogate is conclusive, as therein limited, only upon the persons interested in the estate upon whom the citation shall have been served, either personally or by publication, pursuant to the above sections, numbered 61 and 62. The settlement and allowance of the account does not in any way affect the rights of any claimant who has not been served with the citation; he may maintain every proceeding against the executor or administrator after the settlement which he might have maintained at any time before. Personal service should, as far as possible, be made, and none other is sufficient where the individual is known to reside in the county. If the service be constructively, by publication in another county, it will be of no validity unless the directions of the surrogate have been previously obtained for the same, after a due inquiry into the facts. Publication in the state paper, if necessary, may be made without the surrogate's direction. The citation of persons whose claims have been paid and due acquittances therefor taken, is of course unnecessary; but where there is any question or dispute as to a claim or payment, the person should be duly cited to attend the accounting.

It has been above stated that an executor or administrator, after the eighteen months have expired, is entitled to have his accounts finally settled by the surrogate, whether he has filed an inventory or advertised for claims or not. The advertising for claims, however, is seldom omitted, when it is proposed eventually to proceed to a settlement of the accounts before the surrogate. If the executor or administrator choose to dispense with it, he will be obliged to see that the citation be served on all the creditors, and then on their appearing upon the return of the citation he may assent to their claims, and the accounting will then go on as in other cases. If he dispute the claim of any creditor, as the surrogate, according to the decision before referred to, (b) cannot decide upon its validity, the further proceedings, as to such creditor, must be delayed until that question is settled. If the executor or administrator has published a notice pursuant to the statute, he need cite such creditors only to attend the accounting as have exhibited their claims under the notice, or as have established the same after an action at law, or who have at the time a suit pending therefor. A creditor who has failed to present his claim under the notice, is not precluded from suing the executor or administrator for the same, yet payments or distribution made before suit brought are protected; (c) consequently, if no suit be brought before a final settlement of the executor's or administrator's account, and a distribution thereon, the claim as against the executor or administrator, for assets received up to that time, will be cut off. The plaintiffs in all such suits as are pending, however, whether on claims presented under the notice or not, should be made parties to the accounting, in order that they may be heard respecting the allowance to be made under the above 74th section to satisfy their claims in case they should be established.

(b) *In the Matter of the Estate of John Kent*, Law of Surrogates, &c., 1st ed., App. vii.

(c) See sec. 39, 2 R. S. 89; *Ante*, chap. 10, p. 324-5, 355.

It is to be observed that the statute does not provide that the surrogate shall require proof of the service of the citation before proceeding to a hearing of the parties on the accounting. The whole matter of the service of the citation is left with the executor or administrator, and he must see at his own peril that due service has been made before the accounting takes place. From this it is evident that an objection of the irregularity of the proceedings cannot be entertained on the return of the citation, because if any such exist as to any of the parties, the proceedings are a nullity as to him. Consequently the want of parties is no defect, so far as any person is concerned other than the executor or administrator himself. A person having a claim not made a party to the accounting, may bring an action at law, or compel the executor to account as well after as before the proceeding. The rights of those claimants who have been served with the citation will be adjusted and settled according to the account, and a distribution of any balance remaining in the hands of the executor or administrator will then be decreed, and such settlement and distribution as to them will be final and conclusive, unless duly appealed from.

Proof, however, by affidavit, of the service of the citation, should be taken and preserved by the executor or administrator, and in some cases, as will presently appear, such proof must be produced before the surrogate, in order to render certain proceedings in respect to infants interested in the estate, regular, valid and effectual, for the protection and benefit of such executor or administrator. In any case such evidence may become of the first importance to the executor or administrator, for the purpose of establishing in a subsequent suit or controversy, the sufficiency and conclusiveness of the settlement of the account in the Surrogate's Court.

Proceedings on Return of Citation.

On the return day of the citation, the executor or administrator, and such of the persons interested in the estate as choose to appear, attend before the surrogate. The above section, numbered 63, authorizes the persons interested in the estate to appear on the settlement of the account, and contest the same, and also provides for process to compel the attendance of witnesses. The executor or administrator should see that the appearances of those who present themselves are duly noted and entered by the surrogate. Although, as has already appeared, proof of service of the citation is not requisite to the regularity of the proceedings before the surrogate, yet, for the purpose of rendering the settlement of the account conclusive upon infants interested in the estate, evidence of the due service of the citation upon them should be furnished before the commencement of the hearing. With regard to them, something more than the mere service of the citation is necessary, in order to conclude them by the proposed settlement. For the protection, therefore, of the executor or administrator, he should file an affidavit of due service of the citation on such of the persons interested as are minors; and it is submitted that no proceedings can be taken in respect to them, unless upon such affidavit. When it has been shown that minors interested in the estate have been properly

cited, a special guardian may be appointed for them, to appear for and take care of their interests in the premises, if they should not otherwise duly appear. Notwithstanding they may have been regularly served with the citation, their rights or interests cannot in any way be affected by the proceedings, unless they are legally represented before the court. The service of the citation upon absentees ought also to be shown to the surrogate, in order that he may take care that any stipulations or agreements between the executor or administrator and the persons who appear, as to the observance or application of any rule of law relating to the pending matter, may not operate to the injury of such absentees.

Proceedings as to Infant Parties.

In *Kellett v. Rathbun*,^(d) the Chancellor considers the effect of the non-appearance on the accounting of any person interested in the estate, after having been cited, and prescribes the practice to be pursued where infants are parties to the proceedings. He remarks as follows:

"The Revised Statutes do not direct the particular mode of proceeding, where the parties interested in the taking of the account of an executor or administrator neglect to appear, after being duly cited to attend, upon the final settlement of the account, and no special provision is made for the protection of the rights of infants in such cases. I apprehend, however, that the only effect of the default of a legatee to attend in such a case, would be to enable the executor or administrator to proceed *ex parte* as to such legatee.^(e) Minors are not esteemed in law as capable of conducting or defending a suit for themselves, and they, therefore, cannot be deprived of any of their rights by a mere neglect to appear upon a citation, or other process to compel an appearance. The citation of a minor should be served in the presence of his legal guardian, or in the presence of some person upon whom the actual care or custody of the minor, for the time being, has properly devolved. And evidence of the service of the citation on the minor, merely, is not sufficient, especially if the minor is so young as to be incapable of understanding the object or intent of such service.^(f) The citation in such cases, should direct the minor to appear according to law; that is, by his guardian, lawfully constituted.^(g) And if a minor, who is cited before the surrogate in a testamentary cause, has no general guardian, or if the general guardian has an interest adverse to the rights of the minor, so that he cannot act as guardian in relation to that matter, a guardian *ad litem* may be appointed by the surrogate to protect the rights of the minor."^(h)

It has already been stated that the citation may be directed either generally, to the creditors, &c., or persons interested in the estate, or to the parties by name. The same paper is served on all, and there may be some inconvenience in so framing the citation as to comply

^(d) 4 Paige, 106.

^(e) "See 1 Bro. Civ. & Adm. Law, 457."

^(f) "*Cooper v. Green*, 2 Adams' Eccl. Rep. 454; Law's Pr. Eccl. Courts, 69."

^(g) "Law's Pr. 88; 1 Bro. Civ. & Adm. Law, 454."

^(h) *Turner v. Felton*, 2 Phillim. Rep. 93.

strictly with the above requirement, that it "should direct the minor to appear according to law." That requirement will be substantially observed, by accompanying the service of the citation on the minor with a notice to his parent or guardian, or some competent person of the family, of the nature of the process, and of the necessity, if such exist, for the infant's having a guardian appointed, to appear and defend his interests. The affidavit of the service of the citation should set forth the facts of the minority of the person interested, and of such service of notice. On this proof, the surrogate may make the necessary order as to a guardian *ad litem*. This course is in accordance with the practice in similar cases in the late Court of Chancery,⁽¹⁾ and, it is believed, would be unexceptionable in the Surrogate's Court.

It may be remarked, however, that the practice in the Surrogate's Court with respect to parties who are minors, is by no means well settled. The statute prescribes the mode of appointment of a special guardian of an infant heir or next of kin on proving a will, but is silent as to minors in other cases in the Surrogate's Court, except on sales of real estate by executors and administrators to pay debts. On proceedings for the final settlement of accounts in the court of the surrogate of the county of New York, notwithstanding the above remarks of the Chancellor, which are conceived to lay down a rule on the subject, the practice has been various. Sometimes a *guardian ad litem* for a minor interested in the estate has been appointed without notice to such minor, on the filing of the application for the citation, and the citation has then been served upon the person so appointed, in analogy to the course pursued on proving wills. At others, such guardian has been appointed on the return of the citation, simply on the suggestion of the minority of the person interested, without proof of the service of the citation upon him, or of any other step to bring him before the court. In all such cases, the appointment of a guardian at all was a mere formality, and probably answered no purpose whatever; and the persons appointed have usually so viewed it in general, entirely omitting to give any attention to the proceedings, or to the proper duties of such guardianship. The irregularity, if any, the surrogate could not regard, either of his own motion, or at the instance of a third person in interest, because it could not in any way affect the rights or interests of the minors, the settlement and allowance of the account being conclusive upon those persons only who had been duly brought into court; and it could not possibly prejudice any other person. In other cases again, the surrogate has assumed to represent the minors.

Of the Adjournment of the Accounting.

If the citation has not been duly served upon all the parties interested in the estate, the executor or administrator, on showing that the omission has not been purposely made for the sake of delay, or if the claimant do not object thereto, may obtain an adjournment, and a further citation for the purpose of bringing in those not served. The appearances of those who attend, should, in the first instance, be noted

(1) See 1 Hoff. Chan. Prac. 106; 1 Barbour's Chan. Prac. 51.

and entered, and the proper proceedings in relation to the appearances of the minors, if any such are parties in the case, should also first be taken. If the omission be not sufficiently excused, and the claimant object to the adjournment, it will rest in the discretion of the court whether the delay shall be granted, and if so, upon what terms.

Of the Proceedings on the Accounting—the form of the Account.

On the original return day, or on the day to which the matter may be postponed, the accounting is proceeded with.

It has been stated that the account is not required to be filed until the return day of the citation for the final settlement. On that day, or on the day to which the proceedings may have been adjourned, the account must be brought in. It will consist of a complete history of the proceedings of the executor or administrator in the discharge of the duties of his trust. It should be drawn up with reference to the provisions of the above section of the statutes, numbered 65, declaring the extent to which the settlement and allowance thereof by the surrogate shall be deemed conclusive evidence against the persons interested in the estate. It should state distinctly the assets which originally came into the executor's or administrator's hands on his entering upon the duties of the administration, the disposition thereof, and, if he sold the whole or any part thereof, whether at public or private sale, and the prices obtained for the same. It should set forth the increase, if any, in such assets during the administration, or the decrease, if any, and the cause of the same; and a list of any articles or property remaining undisposed of, and also a list of any property which may have been lost, the appraised value of such property, and the cause of the loss. It should state the claims presented against the estate, specifying those allowed and those disputed, those for which judgments may have been recovered, and any for which suits or proceedings for the recovery may be at the time pending. It should contain a list of the debts due to the estate at the time of the appointment of the executor or administrator, distinguishing those which he had collected and those which he had failed to collect, and alleging the reason for such failure to collect. It should include a statement of all moneys received by the executor or administrator belonging to the estate, and of all interest or profit which he may have received on such moneys. It should set forth all disbursements for funeral or necessary expenses, and all payments made to creditors, legatees or persons entitled in distribution, giving the name of, and the sum paid to each. The executor or administrator may also include in the account such statements of any facts or circumstances which may have attended the administration, as he may deem important to a correct understanding of the manner in which he may have performed the duties of his trust, or to a just settlement of the affairs of the estate. (For forms of accounts, see Appendix, Nos. 66, 68.) The vouchers of the account must be filed the same time with the account.

Of the Executor's Oath to the Account.

The Court of Chancery has frequently decided that when an executor or administrator renders an account to the surrogate, either upon the application of a creditor, legatee or distributee, or with a view to a final settlement thereof under the provisions of the statute, he is bound to bring in a full account of his receipts and disbursements, on oath, including all sums which are properly chargeable to him on account of the estate, whether mentioned in the inventory or otherwise; (j) the substance of which oath is, that the account, according to the best of his knowledge, information and belief, contains a full and true account of all his receipts and disbursements, on account of the estate of the decedent, and of all sums and property belonging to the estate which have come to the hands of such executor or administrator, or which have been received by any other person by his order or authority for his use; and that he doth not know of any error or omission in the account to the prejudice of any of the parties interested in the estate of the decedent: and where the rights of infants or absentees are to be affected by the accounting, it is the duty of the surrogate to see that the account is duly verified by the executor or administrator, although other parties who appear consent to waive such verification of the account. The accounting party must also support the credits he claims, by proper vouchers or other evidence of the payments. And where he wishes to be allowed for payments or disbursements of \$20 or under, for which he has no vouchers or other evidence, the times when, the persons to whom, and the purposes for which such payments or disbursements were made, must be particularly stated; and he must also add to the usual affidavit, verifying the correctness of the account, a positive allegation that the sums charged under \$20, for which no such vouchers or other evidences of payment are produced, have actually been paid or disbursed by him, as charged. (k) (For form of the affidavit, see Appendix, No. 67.)

It is the duty of the surrogate, upon the taking of an account, or upon any other proceeding which may be the subject of an appeal, to reduce to writing and preserve the evidence and admissions of the parties, so far as to enable him or his successor to make a correct return of the facts, in case it shall be necessary, in consequence of an appeal to a higher tribunal. (l)

Of Contesting the Account.

Where the account is made out and verified in the usual form, and the proper vouchers are produced in support of the same, the adverse party should be called upon by the surrogate to state his objections, if any, to the account, so as to save all unnecessary or useless expense; and at the peril of costs, to be charged upon such party personally, if

(j) *Gardner v. Gardner*, 7 Paige, 114; *Williams v. Purdy*, 6 Paige, 166; *Kellott v. Rathbun*, 4 Paige, 102; *Westervelt v. Gregg*, 1 Barb. Ch. Rep. 469. See *supra*, p.

(k) 7 Paige, 114.

(l) 6 Paige, 300.

he makes objections, which, upon a subsequent investigation of the accounts, it shall be found he had no reasonable or probable grounds for making. The estates of deceased persons should not be subjected to the useless expense of producing evidence to prove items in the account of the executor or administrator, the correctness of which items is not in fact doubted by the adverse parties. The objections to the accounts should be stated in the form of distinct and specific allegations. Such allegations may cover every possible ground of objection, such as want of proper vouchers, or that payments have been made, or debts entered, which are not properly to be charged against the estate, or that fraudulent charges have been made, or that assets not included in the inventory have come into the hands of the administrator. In short the account may be surcharged for *omissions* for which credit ought to have been given, or falsified for *wrong* debts, and the party contesting should state these grounds in specific objections.^(m) A party, however, is not absolutely precluded by the objections first made to the account, as it frequently is discovered in the course of the investigation that charges have been improperly inserted in the account, or credits to the estate have been omitted by the executor or administrator, which the adverse party had no means of knowing at the time the account was first presented. In this respect it is like a proceeding in the former Court of Chancery to take an account before a master, where additional charges or discharges might be afterwards received upon sufficient reasons shown, and giving the adverse party an opportunity to be heard thereon, and to produce evidence to rebut or to explain them. And where the account is referred to an auditor, he should be required to proceed in the same manner. The costs of the accounting being in the discretion of the surrogate, if the party contesting the account subjects the accounting party to useless expense by unfounded objections, he may be properly charged with such costs personally.⁽ⁿ⁾

The claimant will compare the vouchers with the corresponding items of the account. His objections, if any, should be framed in the shape of charges against the account, similar, as nearly as may be, to the forms in use in the late Court of Chancery in the practice in the like cases before a master.

He may sometimes require an adjournment of the matter to enable him to examine the account and prepare his charges against the same, and this is nearly always the case in the court of the surrogate of the county of New York on proceedings for a final settlement, the executor or administrator in that court, as has been seen, not being obliged to produce his account until the very day on which the investigation into the same is to take place. The above section of the statute, numbered 64, authorizes adjournments from time to time as may be necessary.

If any claimant fail to appear on the day appointed by the adjournment, the proceedings will go on *ex parte* as to him. Where the executor or administrator neglects to appear on the day to which the matter has been adjourned, the practice is, for the claimant to obtain

(m) *Metzger v. Metzger*, 1 Bradf. Surr. Rep. 265; Wms. 1784; 2 Smith's Prac. 122.

(n) 7 Paige, 115; *Westervelt v. Gregg*, 1 Barb. Ch. Rep. 469.

another adjournment, and to take out and serve upon the executor or administrator a citation returnable on such adjourned day, requiring him to appear and proceed with his accounting. If he still neglect to appear, an attachment may issue against him, if it be shown that his attendance is absolutely requisite to the due investigation into the accounts; otherwise it is supposed the claimants may proceed *ex parte*.

The charges to be preferred by a claimant against the account which has been rendered, may go to the validity of any bequests in the will which the executor may have discharged, or to the liability of the executor or administrator for any claim which he may have paid, as well as to the fact of any payment which he may allege he has made, or the reasonableness and justness of any expenditure with which he may have charged the estate. Any losses arising from his neglect to collect any debt due to the estate, or to take proper measures for the safety and preservation of the property, may also be made the subject of charges against his accounts.

The charges having been presented, the accounting party is only bound to bring proof as to the items or matters disputed thereby. Where the affidavit annexed to the account is full and distinct as to the payments, and the items charged as disbursements under twenty dollars do not, taken together, exceed five hundred dollars, and the payments of sums over that amount are supported by vouchers, it is for the party who objects to the account to falsify or surcharge it.(o)

The executor or administrator is bound to produce his receipts to vouch his payments, and when any party in interest doubts the genuineness of the vouchers, he may proceed to impeach them.(p) It is incumbent upon the accounting party to prove all his payments, which he does as to sums under twenty dollars by his own oath, and as to sums over that amount by vouchers therefor.(q)

The executor must be prepared to establish the propriety of his payments in case they are disputed. The burden of impeaching the payments, however, is upon the party objecting.(r) The surrogate may, in a proper case, sustain the account even without vouchers.(s) And when vouchers are produced they are *prima facie* evidence of disbursements, and should be adjusted in evidence, except the other side can lay a reasonable ground to show they can be impeached. If lost, the accounting party should make oath that such a voucher did theretofore exist; and state its contents and purport. The voucher may be received in evidence, although the specific ground of objection to it is the want of proving the handwriting of the person who signed the receipt.(t) Where vouchers are filed, they become conclusive evidence of the payments, unless successfully attacked by the opposing party.(u)

And the want of an affidavit under the statute verifying a claim

(o) *Kellett v. Rathbun*, 4 Paige, 103; *Williams v. Purdy*, 6 Paige, 166; *Gardner v. Gardner*, 7 Paige, 114; *Westervelt v. Gregg*, 1 Bar. Ch. Rep. 469.

(p) *Bennett's Master's Prac.* 21; *Law Lib. Ib. N. S. p. 851*; *Turner & Venables*, 588.

(q) 2 *Smith's Pr.* 122.

(r) *Ib.*, 128.

(s) *Higgins v. Higgins*, 4 Hagg. 242; 1 *Hoff. Ch. Pr.* 525, 537; *Hoff. Master*, 81.

(t) 2 *For. Exch. Pr.* 239.

(u) *Metzger v. Metzger*, 1 *Bradf. Surr. Rep.* 265.

charged in the executor's or administrator's account to have been paid by him for the estate, will not warrant the surrogate in rejecting the voucher or payment. The statute^(v) provides that on any claim against the estate of a deceased person being presented to the executor or administrator, he may require satisfactory vouchers in support thereof, and also the affidavit of the claimant that such claim is justly due, that no payments have been made thereon, and that there are no off-sets against the same. It is doubtless the prudent and proper course for an administrator in all cases to require the affidavit of the claimant, as he is authorized to do by this section of the statute, if he seeks to be exonerated from having made improper payments, in case objections should subsequently be taken on the settlement of his account, to the items so paid.^(w) But this is entirely optional with him, the statute is not compulsory, nor was it designed to exclude as vouchers, receipts and claims which have not been thus verified. What are proper vouchers still remains for the surrogate or judge to decide, and although it would be wise, in all cases, for the executor or administrator to insist upon his right to demand the affidavit, the surrogate has not the right because he has failed to do so, to infer that the voucher is false, fraudulent or manufactured, or that the debt paid was not due without any affirmative evidence impeaching it.^(x)

Upon an accounting, the affirmative of establishing more assets than are acknowledged by the inventory and account, is with the party objecting; and it must be established with reasonable certainty, and not left to mere conjecture or suspicion.^(y) The legatees can adduce evidence to charge the executor with more assets than he acknowledges to have received; and it is competent for him, on the other hand, to show in defence that the assets were his own property, and not part of the testator's estate, at the time of his death.^(z)

Witnesses may be examined upon the accounting, on both sides, as to any questions raised by the charges relative to the receipts and disbursements mentioned in the account, or to any alleged act, duty, omission or misconduct of the executor or administrator. Such witnesses may be subpoenaed to testify the same as in other cases, and the issuing of the subpoena must be duly entered in the surrogate's minutes. (For form of the entry and of the subpoena, see Appendix, No. 69.)

The testimony of foreign witnesses may be taken by commission, and this is frequently necessary in cases of accounting. The same practice is to be pursued on taking out the commission as was hereinbefore prescribed on taking out a commission to prove a will in the Surrogate's Court. By the section numbered 54, the executor or administrator himself may be examined on oath, touching any property or effects of the deceased which may have come to his hands, and the disposition thereof. The testimony taken on the accounting should be reduced to writing, to remain on file with the surrogate. It need not be recorded.

(v) 2 R. S. 88; 4th ed. 274, sec. 35. *Supra*.

(w) *Williams v. Harden*, 1 Barb. Ch. Rep. 301.

(x) *Metzger v. Metzger*, 1 Bradf. Surr. Rep. 265.

(y) *Marre v. Ginochio*, 2 Bradf. Surr. Rep. 165.

(z) *Merchant v. Merchant*, 2 Bradf. Surr. Rep. 432.

Of Referring to an Auditor.

By the last clause of the above section of the statute, numbered 64, the surrogate may appoint one or more auditors to examine the accounts presented to him, and to make report thereon, subject to his confirmation.

This is the only provision respecting the office of the auditor, and it contains the only prescribed specifications as to his appointment, powers or duties. Its incompleteness in these particulars is striking. No qualifications for the appointment are defined; the auditor is not required to be a disinterested person, nor to be sworn to the faithful and impartial discharge of his duties, and he is not expressly vested with authority to administer an oath or to take the testimony of witnesses, excepting that the term auditor itself imports power to examine the parties and witnesses.^(a)

Whatever may be the deficiencies of the statute, however, the uniform practice in the court of the surrogate of the county of New York, in cases of disputed accounts, and in some cases when the account was not disputed, was formerly to transfer the whole matter to an auditor. Parties, accounts, vouchers, objections and witnesses, were all promiscuously sent to the auditor to be examined and determined upon. This practice has of late been discontinued, and references to auditors are now never ordered, the surrogate himself personally making the requisite investigation of the accounts.

In case of a reference, it is generally made of the surrogate's own motion; but it may doubtless be made on the application of either of the parties. An order for the reference must be made and entered in the surrogate's minutes, and a copy should be furnished to the auditor and served by the executor or administrator on each of the other parties to the accounting. An order of reference to an auditor, not founded upon a proper application before the surrogate for the settlement of the account, nor upon any proceedings which require a settlement and adjustment of the accounts as between the parties, is erroneous.^(b) The order appoints a day for the first meeting before the auditor, and also a day for the return of his report. (For form, see Appendix, No. 70.)

Any of the parties to the matter may attend before the auditor. Subpœnas to compel the attendance of witnesses, returnable before the auditor, are issued by the surrogate. The witnesses are sworn to testify the truth, sometimes by the surrogate, sometimes by the auditor himself, and sometimes by an officer authorized to administer oaths, called in for the purpose. The auditor may adjourn the hearing from day to day as may be requisite. If the investigation be not completed within the time limited by the order of reference, such time may be extended by the surrogate on the cause for the extension being shown. At the conclusion of the inquiry, the auditor makes up his report. Similar proceedings may doubtless properly be had for the settlement of the

(a) It may be doubted, however, whether this term, in its legal signification, conveys any such power. In the action of account at common law, until aided by statute, the auditors could not administer oaths or examine the parties. See 1 Story's Eq. Jur. 447-8.

(b) See *Westervelt v. Gregg*, 1. Barb. Ch. Rep. 469.

auditor's report as for the settlement of a master's report in Chancery. He usually annexes to his report the testimony which he has taken, and returns the whole to the surrogate. (For form of a report of an auditor, see Appendix, No. 71.) He is allowed two dollars a day, for each day engaged in the reference, as a compensation for his services.

On the coming in of the auditor's report on the day appointed by the order of reference, or at the expiration of the extended time, the same is before the surrogate for confirmation. If either party conceive himself aggrieved by the decisions of the auditor, he may object to the confirmation of the report. It would be a useful precaution for a party who considers the auditor's report incorrect, to file a *caveat* with the surrogate against the confirmation of the same. An adjournment for a reasonable time will be allowed to enable a party to present his objections. They should be in writing, and should be drawn in the shape of exceptions to the report. They should be filed with the surrogate, and a copy should be served on each of the other parties appearing in the matter.

On the day to which the matter has been adjourned, the parties are heard on the report and exceptions, and the surrogate thereupon proceeds to allow or disallow the exceptions, or to confirm or modify the decisions of the auditor as he may deem just, and to decree the settlement of the account accordingly, and also distribution thereon.

The practice on a reference to an auditor has thus been considered, and a case has been carried through to a final decree. The principles and rules which govern the accounting, and the final decree and the distribution remain to be considered. These will be treated of as in a matter remaining and heard throughout before the surrogate, because he is the principal officer, and to him belongs the power of reviewing the decisions of the auditor. It is necessary merely to remark, that the same principles and rules apply to the accounting both where it is conducted solely before the surrogate and where a reference to an auditor takes place.

Of the Liability of an Executor.

An executor is personally liable in equity for all breaches of the ordinary trust which, in courts of equity, are considered to arise from his office. And it may here be observed, that where personal property is bequeathed to executors, as trustees, the circumstance of taking probate of the will is, in itself, an acceptance of the particular trusts. Therefore, when the will contains express directions what the executors are to do, an executor who proves the will, must do all which he is directed to do as executor, and he cannot say that, though executor, he is not clothed with any of those trusts.(c)

The general rule adopted, with respect to the liability of executors and administrators on this head, is founded upon two principles: 1st. That, in order not to deter persons from undertaking these offices, the court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight

(c) Wms. on Exrs. 1530.

grounds. 2d. That care must be taken to guard against an abuse of their trust.(d)

Of Debts due to the Executor.

The general affidavit annexed by the executor or administrator to his account, verifying the same, and the receipts and disbursements therein entered, will not be sufficient in any case to authorize the executor or administrator to retain, as for a debt due to himself from the decedent. The 33d section of the article of the Revised Statutes, relative to the duties of executors and administrators in the payment of debts and legacies,(e) appears to contemplate an application to the surrogate in the first instance, by the executor or administrator, to determine as to the validity of a claim of indebtedness to the latter, before he shall be allowed to retain for such debt, or his proportional part thereof. And upon such application he must produce to the surrogate legal evidence of the existence of the debt, in addition to his own oath that it is justly due, after allowing all payments and all proper discounts and off-sets, unless such debt is admitted by those who are interested in the estate. It has been seen,(f) with reference to this section, that proceedings under it, even with the aid of the provisions of the 37th section of the act of 1837,(g) are attended with very great difficulties. It will be observed, also, that the last mentioned section recognizes the allowance of the executor's or administrator's claim on the final accounting. If the executor or administrator, instead of proving his debt before the surrogate in the first instance, claims an allowance therefor upon the final settlement of his account, which is the course always adopted, he is in the same situation as any other creditor, and must therefore not only verify the justice of his claim by his oath, but, if it is objected to, he must establish it by legal evidence, in addition to his own oath.(h) (For form of an executor's or administrator's oath to his claim, see Appendix, No. 72.) If the claim be disputed by any of the parties in interest, legal proof of its validity must be adduced, and it must be established to the satisfaction of the surrogate by competent testimony.

Of Allowance for Property Perished or Lost.—Devastavit.

By the above section, numbered 56, the executor or administrator may be allowed for property of the deceased, perished or lost without his fault. The general rule has long been established, that an executor or administrator shall not be charged with any other goods as assets than those *which come to his hands*. However, upon the supposition that goods come fully into the possession and hands of the executor or administrator, but are afterwards wrongfully taken from him, a question arises whether such goods shall be considered assets in his hands. There are some authorities for asserting that things taken out

(d) *Powell v Evans*, 5 Ves, 843; *Raphael v Boehm*, 13 Ves. 410; *Tebbs v Carpenter*, 1 Madd. 298; Wms. 1530.

(e) 2 R. S. 88; 4th ed. 274. See *ante*, p. 358.

(f) *Ante*, p. 358.

(g) *Ante*, p. 359.

(h) See *Williams v Purdy*, 6 Paige, 168; *Kellett v Rathbun*, 4 Ib. 102; *Clark v. Clark*, 8 Ib. 159.

of the possession of the executor are assets in his hands, unless they were taken by public enemies. But it should seem, at least, in a court of equity, that an executor or administrator stands in the condition of a gratuitous bailee; with respect to whom the law is, that he is not to be charged, without some default in him. Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not, in equity, be charged with these as assets.⁽ⁱ⁾

Again, if a trespasser takes goods out of the possession of an executor or administrator, although he is bound to sue the trespasser, if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit. But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers; for there was a default in him. Again, if the goods be perishable goods, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself. So, if the testator's sheep or other beasts die, or if his ships perish by pest, the executor shall not be charged with them as assets.^(j)

With respect to that part of the estate of an executor or administrator which consists of choses in action, the law has long been settled, that although debts of all descriptions due to the testator are assets, yet the executor or administrator is not to be charged with them till he has received the money.^(k) An outstanding debt due to a decedent, is not assets in the hands of his executors or administrators, where there has not been gross negligence, or collusive, fraudulent and unreasonable delay in collecting it.^(l) So, if the executor or administrator recovers, at law or in equity, any damages or compensation for any injury done to the personal estate of the testator, before or since his decease, or for the breach of any covenant or contract made with the tes-

(i) Wms. on Exrs. 1419, 1420, and cases cited.

(j) Wms. 1420, and cases cited. The statute relative to suits by and against executors and administrators provides as follows:

Sec. 14. In any action against executors or administrators, in which the fact of their having administered the estate of their testator or intestate, or any part thereof, shall come in issue, and the inventory of the property of the deceased, made and filed by them, shall be given in evidence, the plaintiff or defendant may rebut the same by proof.

1. That any property or effects have been omitted in such inventory, or were not returned therein at their true value:

2. That such property has perished or been lost, without the fault of such executor or administrator, or that it has been fairly sold by them at private or public sale, at a less price than the value so returned; or that since the return of the inventory, such property has deteriorated or enhanced in value.

Sec. 15. In every such action, the defendants shall not be charged for any demands or rights in action specified in their inventory, unless it appear that such demands or rights have been collected, or might have been collected with due diligence.

Sec. 16. The last two sections shall not be construed to vary any rules of evidence in respect to any proof which an executor or administrator may now make by law.

See *ante*, p. 325.

(k) Wms. 1421, and cases cited.

(l) *Ruggles v. Sherman*, 14 Johns. Rep. 446.

tator, or with himself in his representative character, all such damages thus recovered shall be assets in his hands, the costs and charges of recovering them being deducted: but he shall not be charged with them until he has reduced them into possession.^(m)

But such debts or damages will be regarded as assets, although never, in point of fact, received, if they be released by the executor: for the release, in contemplation of law, shall amount to a receipt. So, if the executor takes an obligation in his own name for a debt due to the testator, he shall be equally chargeable as if he had received the money, for the new security has extinguished the old right, and is a *quasi* payment.⁽ⁿ⁾

Such acts of negligence, or careless administration, as defeat the rights of creditors or legatees, or parties entitled in distribution, amount to a *devastavit*: for if persons accept the trust of executors, they must perform it; they must use due diligence, and not suffer the estate to be injured by their neglect. Thus, if an executor has a lease for years, determinable upon the life of J. S., which is, upon a reasonable estimate, worth \$1,000, if the executor will not sell this, but keeps it, and J. S. dies in a short time, yet the executor shall answer for the value of it at the time of the death of the testator; for it was his own fault that he would not sell it.^(o)

Where an executor neglected to sell certain stock belonging to the testator's estate until it had depreciated in value, and then suffered it to be sold under execution at a price much below its former value; this was held to be waste and unfaithful administration, for which he was liable on his probate bond.^(p) So, if an executor or administrator unreasonably delay the payment of a debt payable on demand, with interest, and compel the creditor to obtain a judgment for the principal and interest, this is a *devastavit* for at least so much of the interest as accrued after sufficient assets were received applicable to the demand. And where the executor or administrator permits debts carrying a high rate of interest to run on when he had in his hands a fund to pay them, he shall be charged with interest at such high rate.^(q)

"Again, if the executor submits a debt due to the testator to arbitration, and the arbitrators award him less than his due, this being his own voluntary act, shall bind him, and he shall answer for the full value as assets.^(r)

"But though, generally speaking, an executor, compounding or releasing a debt, must answer for the same; yet, if it appears to have been for the benefit of the trust estate, it is an excuse: therefore, in a case where there were arrears of rent on a lease, and, on the tenant's becoming insolvent, the executor released the arrears, and gave him a sum of money to quit the possession, Lord Talbot held, that as the executor appeared to have acted for the benefit of the estate, he should be

(m) Wms. 1421, and cases cited.

(n) Wms. 1421-2, and cases cited.

(o) See Wms. on Exrs. 1535-6.

(p) "*Brazier v. Clark*, 5 Pick. 96."

(q) See Wms. on Exrs. 1536.

(r) "*Wentw. Off. Ex.* 304, 14th ed.; *Anon*, 3 Leon. 53; Com. Dig. Admon. (I 1); *Bac. Abr. Exors.* (L 1); *Yard v. Ellard*, 1 Lord Raym. 389, by Holt, Ch. J." Wms. 1553.

allowed both sums.^(rr) So, in *Pennington v. Healy*,^(s) an administrator sued a debtor to his intestate, and recovered a verdict against him; and the debtor, being in jail, subsequently petitioned to be discharged under the Insolvent Act. The debtor offered terms whereby he was to be liberated on the payment of £150, a sum less than the costs incurred in the action. The administrator agreed to the terms, and liberated the debtor; and the Court of Exchequer held, in an action brought against him by a creditor of the intestate, that he was not chargeable with any part of the debt as assets.^(ss)

In order, therefore, to obtain the authority of the surrogate to compromise a debt due the estate, under the provisions of the act of 1847, above quoted, it must be shown that such compromise will be for the benefit of the estate; and a compromise of a debt, made even with the sanction of the surrogate, would probably not be protected, if it contravened the principle of these cases.

Again, if the executor by his delay in commencing an action, has enabled the debtor of his testator to protect himself under a plea of the Statute of Limitations, this amounts to a *devastavit*. So, where the testator had money lent out on bond, and the executor during several years made one application, by an attorney, to the obligor, but brought no action against him, Lord Thurlow held, that the executor should be liable for the sum due, as having not been got in by reason of his neglect, although it did not appear whether the debt was or was not recoverable.^(t) So, where, for more than three years, the executors permitted money to remain due on bond to the testator, without inquiring into the circumstances and situation of the obligor, or calling upon him to pay the money, Lord Alvanley held, that on the obligor's becoming bankrupt, the executors were responsible.^(u)

In *Shultz v. Pulver*,^(v) as was seen in a preceding portion of this work, the Court of Errors of this state held, that if debts collectable are not collected within a *reasonable time* after the granting of letters testamentary or of administration, the executor or administrator is personally responsible for the amount of such debts to creditors, or to those entitled to the proceeds of the estate, in the order of distribution, although the debts have not been *lost* by the delay; and no improper motives are imputable to the executor or administrator: and that the administrator in this state, is bound to take measures for the collection of a demand due the estate he represents from a debtor residing in *another state*, either by obtaining himself, or employing an agent there to obtain letters of administration, and instituting proceedings by virtue thereof.

An executor, however, is not bound to prosecute a claim of very doubtful character, at the request of parties having only a contingent interest in the estate, unless they indemnify the estate against the costs.^(v)

(rr) *Blue v. Marshall*, 3 P. Wms. 381. See, also, *Legh v. Holloway*, 8 Ves. 213.

(s) 1 Crompt. & M. 402; S. C., 3 Tyrwh. 319.

(ss) Wms. on Exrs. 1553-4.

(t) "*Lawson v. Copeland*, 2 Bro Chan. Cas. 156."

(u) "*Powell v. Evans*, 5 Ves. 839." Wms. 1536, 1538.

(v) 11 Wend. 361. See *ante*, ch. 7.

(v) *Hepburn v. Hepburn*, 2 Brad. Sur. Rep. 74.

Of the Executor's Accountability for Investments.

As to investments made by an executor or administrator, it appears that where an executor puts out the money of his testator, though without the indemnity of a decree, upon a real security, which there was no reason then to suspect, but afterwards such security proves bad, the executor is not accountable for the loss, any more than he would have been entitled to the profits, had it continued good.(w)

"With respect to loans upon personal security, the rule is now completely established in equity, that an executor or administrator lending money of the deceased upon bond, promissory note, or other personal security, is guilty of a breach of trust, and shall be personally answerable if the security prove defective. A court of equity will hold them bound to make good a loss sustained in such securities, because other and better, as government stocks and mortgages of real estate, are accessible to them as means of safe investment.(x)

Such is the rule in England. When a general power is conferred upon persons acting in a representative capacity, to make investments, they are confined, in its exercise, to real and government securities. This rule has not been abrogated or altered by any legislative action in this state, and the cases would seem to recognize the expediency of retaining it. It sanctions the investment of the moneys of the *cestui que trust* in loans on real security, or in the public stocks of this state or of the United States, and also, under the rules of the Supreme Court, in loans to the New York Life Insurance and Trust Company.(xx)

If trustees, exercising a general power to make investments, go beyond the limits prescribed by law in selecting a mode of investment, neither good faith, nor care nor diligence, will protect them in the event of an actual loss. In such cases they assume the risk, and are responsible accordingly.(xx)

A trustee will not be protected against loss, arising from the depreciation of trust funds invested by him, unless he loans on real security, or invests in some fund approved by the court. Where an executor invested the legacy of an infant *cestui que trust* in stock of the Dutchess County Bank, which, at the time of the settlement, had greatly depreciated in value, he was held liable to pay the infant on her arriving at age, the amount of such legacy and interest.(y)

"If, however, the will directs the executors to lay out the fund in real or personal securities, they would be justified as against legatees, using a sound discretion, and fairly and honestly lending it to a person whom they considered responsible, at a reasonable interest. But the rule is different, it should seem, as against creditors; and though the will gives the executors power to lend on personal security, this does not enable them, even as against legatees, to accommodate a trader with a loan on his bond."(z)

However, as it will presently appear, an executor is not justified in

(w) Wms. 1538-9; but see *Norbury v. Norbury*, 4 Mad. 191.

(x) *Bogart v. Van Velsor*, 4 Edw. Ch. Rep. 722.

(xx) *Ackerman v. Emott*, 4 Barb. S. C. Rep. 620.

(y) *Ackerman v. Emott, &c.*, before Parker, V. C., N. Y. Legal Observer, (Sept. 1845, vol. 3,) p. 337; 4 Barb. S. C. R. 626.

(z) Wms. 1540, and cases cited.

unnecessarily keeping his testator's money dead in his hands; and, therefore, if the exigencies of his office do not require otherwise, the executor should invest the unemployed money in good securities. If they purchase stocks, they should be careful to select such as the court will consider safe. Perhaps it is never advisable to purchase stock where landed security can be obtained.(a)

With respect to the loaning of the money of the estate, even on mortgage of real estate, a degree of care is necessary, which, if omitted, will render executors or trustees personally liable. They are bound to use ordinary care to ascertain that the title of the mortgage is valid, and that the value of the property at the time of the loan, is such as will, in all probability, be an adequate security for the repayment with the interest of the amount loaned, whenever the money shall be called in. The criterion of value in such cases, is the opinion or estimate of men of ordinary prudence, who would deem it safe to make a loan of the like amount of their own money on the same property. Such men, it appears, have adopted a rule, and it is the only safe practical rule, not to lend more than from one half to two-thirds of the value of the property mortgaged. If executors follow this rule, they will not be held responsible for a failure of the security. If they make a loan exceeding two-thirds of the fair and reasonable value of the property, relying upon the supposed ability of the borrower, and the bond which he shall give them, they must not complain if the law charges them with the consequences of a departure from established practice, and compels them to take such unfortunate securities to themselves. They may make the loan honestly and in good faith; but good faith and honest intentions will not protect men in the performance of a trust, when they depart from prudential rules which the experience of others in similar transactions have approved as the only safe guides.(b)

An executor, however, is only required to manage the estate in his charge, as a prudent man would his own, and, in case of loss, the question of his liability depends upon the particular circumstances of the case.(c) He is not chargeable with the consequences of a disastrous exercise of his discretion, unless accompanied with such negligence as raises a presumption of wilful misconduct.(d)

Where executors are obliged to foreclose a mortgage belonging to the estate of their testator, if the property will probably sell for a sum below its actual value, so as to endanger a collection of a part of the mortgage debt, it is their duty to bid in the property for the benefit of the estate, and to take the conveyances to themselves, as such executors, and to hold the premises until they can be sold for a fair price. And where the property remains in their hands unsold, at the time of accounting before the surrogate, he may direct a sale thereof, and a distribution of the proceeds of such sale, as a part of the estate.(e)

The question may here be considered, how far an executor or administrator is liable, in respect to losses occasioned by not calling in the money of the testator already invested upon securities. Executors

(a) Wms. 1541; Taylor's Prec. of Wills, 96.

(b) Bogart v. Van Velsor, 4 Edw. Ch. Rep. 718.

(c) Bryan v. Mulligan's Exrs, 2 Hill's Ch. Rep. 364. (d) 4 Watts' R. 177; T. P. of W. 152.

(e) Clark v. Clark, 8 Paige, 152; Bogart v. Van Velsor, 4 Edw. Ch. Rep. 718.

ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary. Accordingly, in *Powell v. Evans*,^(f) executors were charged with a loss, caused by neglecting to call in money lent by the testator on bond. So, in *Moyle v. Moyle*,^(g) executors and trustees, who, for upwards of a year after the testator's death, allowed a considerable portion of the assets to be unproductive in the hands of a banker, who failed, were, under the circumstances, charged with the loss.^(h)

It is not the duty of an executor or administrator to call in money invested on real security, where no risk is apparent.⁽ⁱ⁾

"Generally speaking, if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hands, and, consequently, appointing another to receive, who will not repay, is a *devastavit*."

"But with respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, the rule, at least in equity, seems to be, that where the deposit was made from necessity, or conformably to the common usage of mankind, the executor will not be responsible for the loss. But if the executor pays the money of the testator into a banker's, not on any distinct account, but *mixing it with his own money*, it should seem that the executor will be answerable for the loss sustained by the failure of the banker."^(j)

A *devastavit* by one of two executors or administrators shall not charge his companion, provided he has not intentionally or otherwise contributed to it; for the testator's having misplaced his confidence in one, shall not operate to the prejudice of the other. Hence an executor shall not, under ordinary circumstances, be responsible for the assets come to the hands of his co-executor.^(k)

But where an executor possessing assets of his testator, hands over those assets to a co-executor, and they are misapplied by that co-executor: there the executor who so hands them over shall be answerable for their misapplication, because he had a *legal* right to retain them, and might have preserved them; and it was his *duty* to do so; unless, indeed, they were so handed over for the express purpose of a special administration by the co-executor, as for the payment of a particular debt.^(l)

The rule may, perhaps, be stated to be, that where, by any act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger whom he had entrusted to receive it.^(m)

Where an executor or administrator, by his negligence, suffers his

(f) 5 Ves. 839.

(g) 2 Russ. & M. 710.

(h) Wms 1543-4. But see *Buxton v. Buxton*, 1 Mylne & Cr. 80, where diligence and good faith were held, under the circumstances, a competent excuse for a loss occasioned by a delay in selling certain Mexican bonds belonging to the estate.

(i) *Howe v. Earl of Dartmouth*, 7 Ves. 150; Wms. 1545; *Elliott v. Lewis*, 3 Edw. C. R. 46.

(j) See *Clough v. Bond*, 3 Mylne & Cr. 496; Wms. on Exrs. 1547.

(k) *Douglas v. Satterlee*, 11 Johns. Rep. 16; Wms. on Exrs. 1548.

(l) *Townsend v. Barber*, Dick. 366; *Davis v. Spurling*, 1 Russ. & M. 66; *Merick v. Merick*, 7 Barb. 120.

(m) Wms. on Exrs. 1293, and cases cited; *Sterrett's Appeal*, 2 Penn. Rep. 419.

co-executor or co-administrator to receive and misapply, or waste the funds of the estate, when he has the means of preventing it by proper care, he is liable for the estate thus wasted, if the amount misapplied or wasted cannot be collected from his co-executor or co-administrator.(n)

But if an executor is merely passive, by not obstructing his co-executor from getting the assets into his possession, the former is not responsible.(o)

In *Sutherland v. Brush*,(p) an executor was held not to be responsible for the *devastavit* of his co-executor, except so far as he has concurred in such waste or misapplication of the assets.

It is a general rule, where an executor has once proved the will, he cannot renounce his representative character and act under another; he can do no act in regard to the estate for which he is not answerable as executor.(q)

Where two executors or trustees join in a receipt for money, it is *presumptive* evidence that money came *equally* into the possession or *under the control* of both; and it has been held, there must be direct and positive proof to rebut the presumption. Where, however, A, in the absence of his co-executor, received the money, it was held that he alone was liable, though the other executors signed the receipt.(r)

Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the control of the money. That rule is now altered. Whether the alteration is wholesome may be a question. It may be laid down now, that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. The former was a simple rule, that joining shall be considered as acting; but in the cases since the rule, that joining alone does not impose responsibility, scarcely two judges agree.(s)

Where there are several administrators, the practice is to take a joint and several bond from all on granting the letters of administration, but this does not render the administrators liable for the acts of each other. They merely become all liable for their joint acts, and each one becomes liable for his own separate acts. The sureties in such a bond, however, are bound for the separate acts of each administrator as well as for the joint acts of all.(t)

"If a *feme sole*, being an executrix or administratrix, wastes the goods of her testator or intestate, and then marries, her husband is liable as long as the coverture lasts, for the *devastavit*. But, upon her death, his liability ceases; and such being the principle of law, courts of equity have held that they could not establish any rule upon the difference whether the husband had or had not received a portion with his wife.

(n) *Clark v. Clark*, 8 Paige, 152; *Johnson v. Corbett*, 11 Paige, 265. But where a misapplication of the estate is by applying the personal estate to the satisfaction of debts chargeable upon the real estate belonging to the heirs at law of the decedent, the administrator who is compelled to pay the amount so misapplied, to other creditors of the decedent, is entitled to a remedy to recover the same out of the real estate in the hands of the heirs. 11 Paige, 266.

(o) Wms. on Exrs. 1549, and cases cited.

(p) 7 Johns. Ch. Rep. 17.

(q) Wms. on Exrs. 1588.

(r) 2 Lord Kenyon's Rep. 541. See, also, *Douglass v. Satterlee*, 11 Johns. Rep. 16.

(s) See Wms. on Exrs. 1559-60-61, and cases cited, and the cases are collected in Taylor's Prec. of Wills, 448, n.

(t) See *Kirby v. Turner*, Hop. 309. But see *Lidderdale v. Robinson*, 2 Brockenbrough, 159.

"It must, however, be observed, that if the wife was entitled to any choses in action, which the husband did not reduce into possession in her lifetime, so that it becomes necessary for him to take out administration to her, he will be liable, as her administrator, for her *devastavit*.

"With respect to the *devastavit* of the wife committed during the coverture, the husband is liable, in law and in equity, as long as both parties are alive, for the acts of his wife as executrix or administratrix; for, as she has no power to act alone, his assent will be presumed.

"Upon the death of the wife, the general rule is, that the liability of the husband, (except as her administrator,) for his wife's *devastavit*, committed as well during coverture as before, ceases.

"But in equity, the surviving husband is liable for whatever assets came to the hands of his wife, or his own hands, during the coverture, upon the principle that all persons coming into possession of property bound by a trust, are chargeable in equity as trustees."^(u)

The responsibility of the married executrix, after the death of her husband, for a *devastavit* committed during the coverture may here be adverted to. The rule is, that though the waste during the coverture be the act of the husband, yet it is an act for which the wife, after the determination of the coverture, is responsible to creditors at law, and, as it should seem, to legatees in equity.^(v)

By the above section of the statutes, numbered 57, the executor or administrator shall make no profit by the increase, nor shall he sustain any loss by the decrease, without his fault, of any part of the estate; but he shall account for such increase, and shall be allowed for such decrease, on the settlement of his account. He must account for all profits which have accrued in his own time, either spontaneously or by his acts, out of the estate of the deceased. Thus, if the sheep, or other cattle of the testator, bear lambs, &c., after the testator's death, these, although never the property of the testator, will be assets. So, if the executor of a lease for years enter into the tenements, the profits, over and above the rent, shall be assets. Therefore, if an executor has a lease for years, which yields profits to the value of \$100 a year, rendering rent of \$50 a year, he shall account for \$50 a year as assets. Again; if an executor employ the testator's goods in trade, the profits shall be assets. So, if the executor carries on the trade or business of the testator, whether in pursuance of a provision in articles of partnership entered into by the deceased, or by direction of the testator, contained in his will, or under the direction of the Court of Chancery, the profits must be accounted for as assets. Accordingly, in *Cooke v. Collingridge*,^(w) a sale of a testator's share in a partnership trade, and the property belonging to it, made by his executors to his partners, for the purpose of being resold to one of his executors, was set aside, and his estate held entitled to his *aliquot* proportion of the subsequent profits, as if the partnership had continued.

^(u) Wms. on Exrs. 1562-3, and cases cited. In *Elliott v. Lewis*, (3 Edw. Ch. Rep. 40,) it is laid down, that if the *devastavit* by the administratrix occurred before the marriage, after her death the husband is not liable for the consequences; and that even if it occurred during the coverture, he is not liable after her death, unless he concurred in the misapplication and received some benefit from it. See 1 Roper, Husband and Wife, 187-188.

^(v) Wms. on Exrs. 1564.

^(w) "Jacob, 607."

So, in *Case v. Abeel*,^(x) where the testator and his brother, one of the executors, had been partners, and the brother, after the testator's death, bought his share of the partnership property of the other executor, at a valuation by disinterested persons, and continued the business; it was held that he was accountable for the profit made by the increased value of the stock in trade, if it could be ascertained; and as the stock in trade of the partnership had been mixed with other goods of the executor, and sold out by retail at different periods, so that those profits could not be ascertained, and as there was some mistake in the valuation at the time of the sale, that a new valuation must be made, and that the good will of the business should be taken into consideration,^(y) and that interest should be charged against the executor, and the accounts taken, upon the principles of the case of *Clarkson v. De Peyster*,^(z) presently to be noticed.

And it is a general rule, that an executor cannot be allowed, either immediately or by means of a trustee, to be a purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased.^(a)

And a sale made by an executor or administrator of property of the decedent to himself, however fair and honest it may have been, will be set aside on the application of any person in interest, provided such application be made within a reasonable time after the sale, which is to be judged of by the court, under all the circumstances of the case.^(b)

In cases of purchases by trustees or others, who are not authorized to purchase without the consent of their principal or *cestui que trust*, the rule of equity is, that if the purchaser has not divested himself of the property, it is to be put up again, at the amount of the former bid, together with the value of beneficial and lasting improvements made thereon after the sale, and if it brings nothing more, he is to be holden to his purchase. But if he has parted with the estate, he may be compelled to account for all the profit which has been made by him on the resale.^(c)

"If an executor compounds debts or mortgages, and buys them in for less than is due upon them, he shall not take the benefit of it himself, but other creditors and legatees shall have the advantage of it; and, for want of them, the benefit shall go to the party who is entitled to the surplus. So, in a case where the executor of a mortgagee purchased the equity of redemption of the mortgaged estate in his own name, with the money due on the mortgage, and a small advance beyond it, it was held that he was a trustee of the purchase, for the benefit of the testator's estate.^(d)

(x) 1 Paige, 393.

(y) See, also, as to executor's or administrator's accountability for the good will of a trade, *Gibblett v. Read*, 9 Mod. 469; *Worral v. Hand*, Peake, N. P. C. 74, Acc.; *Collyer on Partnership*, p. 32; *Farr v. Pearce*, 3 Madd. 78; *Hammond v. Douglas*, 5 Ves. 539; *Crawshaw v. Collins*, 15 Ves. 227; *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

(z) 2 Wend. 77; See *infra*, p. 491.

(a) See Wms. 1566, and cases cited.

(b) See Story's Eq. Jur. 326; 4 Kent's Comm. 438; *Hawley v. Cramer*, 4 Cowen, 717; *Case v. Abeel*, 1 Paige, 393; *Stiles v. Birch*, 5 Ib. 132; *Van Epps v. Van Epps*, 9 Ib. 237; *Campbell v. Johnston*, 1 Sandf. Chan. Rep. 148; *Stuart v. Kissam*, 2 Barb. Sup. Ct. Rep. 493; *Ames v. Downing*, 1 Bradf. Surr. Rep. 321; *Conger v. Ring*, 11 Barb. Sup. Ct. Rep. 356.

(c) 4 Cowen, 744.

(d) "*Fosbrooke v. Balguy*, 1 M. & K. 226."

"Again; if an executor lays out the assets on private securities, although he shall answer for all deficiencies which may be caused thereby, he must account to the estate for all the benefit. Indeed, the principle is general, that an executor, if he will take upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself into this situation, that if there be any loss, he must replace it; but he cannot possibly be a gainer by it—any gain must be for the benefit of his *cestui que trust*.(e)

"Executors and trustees must be made to understand that it is their duty to keep the funds of their trust separate and distinct from their other funds and business; that they should upon no consideration use the trust moneys themselves, or permit it to be mingled with their own moneys or property. In no other way can they save themselves from trouble, litigation and censure. If they neglect this obvious duty, they have no reason to complain if they meet with trouble and expense, and sometimes with heavy loss. The protection of the rights of those who are not in a situation to protect themselves, makes it the duty of courts of justice to require fiduciaries to make good all losses which have been occasioned by their neglect."(f)

Of the Liability of Executors for Interest.

This may be the proper place to inquire under what circumstances executors or administrators shall be charged with interest on the assets retained in their hands. The executor or administrator may be charged with interest when he has been guilty of negligence in omitting to lay out the money for the benefit of the estate, or when he himself has made use of the money to his own profit and advantage, or has committed some other *misfeasance*. With respect to neglect on the part of the executor in not laying out balances, it must be observed, that it frequently may be necessary and justifiable for an executor to keep large sums in his hands to answer the exigency of the testator's affairs, especially in the course of the first year after the decease of the testator. But if the court observes that an executor keeps money dead in his hands without any apparent reason or necessity, then it becomes negligence and a breach of trust, and the court will charge the executor with interest. And it seems that outstanding demands, even on probable grounds, are no reason why the executors should not lay the testator's money out. But an executor shall not be charged with interest for a balance in his hands, retained under a fair apprehension of his right to it.(g)

Interest is not ordinarily chargeable against an executor or administrator, for the period of a year after the issuing of his letters, especially if the funds of the estate have been kept separate and not mixed with his own. But at all times, if he has employed the funds of the estate, he will be charged with interest on the ground of the use of the assets for his own benefit.(h) Where the testatrix left at her decease a sum of upwards of 5,700 dollars in cash, and the executor, within four months of her death, collected a further sum of upwards of 2,250 dollars

(e) Wms. 1567.

(f) 1 Paige, 402; *Ackerman v. Emott*, 4 Barb. 620.

(g) See Wms. 1567-8, and cases cited.

(h) *Ogilvie v. Ogilvie*, 1 Bradf. Surr. Rep. 356.

belonging to her estate, and he deposited the whole to his individual credit in the Mechanics Bank, and his bank account showed that in repeated instances the sum standing to his credit in the bank was greatly less than the amount of the funds of the estate in his hands, and at one time was reduced as low as 700 dollars, and the executor seemed to have been somewhat actively engaged in the business of loaning money, and had frequent and large discounts at the bank, and he did not allege that the testatrix was in debt, or that there was any likelihood of the existence of any demand against the estate, it was considered quite reasonable to charge him with interest from the period of six months after the death of the testatrix, upon the cash balance in his hands at that time.

In *Garniss v. Gardiner*,^(hh) which was the case of the accounting of the defendant, David Gardiner, as administrator, &c., of Alexander McLachlan, deceased, the question was whether he should be charged with interest, and if so, should it be simple or compound interest? and the Vice-Chancellor said:

"As a general rule, executors, administrators and trustees are liable to pay simple interest, where they unnecessarily retain the money in their hands, hold it an unreasonable time, mix it with their own private funds, use it in the way of trade, or derive any personal advantage from it.

"It is only in special cases, and under peculiar circumstances, which must be proved, that interest is to be compounded against them.

"In the case of *Raphael v. Boehm*,⁽ⁱ⁾ an executor was expressly directed by his testator's will to place out money at interest in order that it might accumulate. But, contrary to this direction, he kept the money himself. The court allowed compound interest against him. The same thing was done in the Court of Chancery of South Carolina, in *Bowles v. Drayton*,^(j) and *Edmonds v. Crenshaw & McMorries*.^(k)

"It would seem, however, that the allowance of compound interest is to be confined to cases of wilful omission of duty, and ought not to be adopted where the executor, administrator or trustee has only been negligent.^(l)

"Where an executor, administrator or trustee converts the trust money to his own use, and employs it in trade or business, making profits of which he refuses to give any account, he may be charged with compound interest. In *Schieffelin v. Stewart*,^(m) a computation of compound interest was resorted to, in order to meet the profits which an administrator had made out of the trust property, and which he would not disclose. This principle is founded upon the doctrine, that a person standing in a fiduciary situation shall never be permitted to make gain to himself of the trust property in his hands. In *De Peyster v. Clarkson*,⁽ⁿ⁾ it was contended *arguendo* that *Schieffelin v. Stewart*, and the English cases there cited, were not supported by authority. The Court of Errors, however, expressed no opinion upon the point, as the

(hh) 1 Edw. Ch. Rep. 128.

(i) 11 Ves. 92.

(j) 1 Dessau. 489.

(k) Harper's Eq. Ca. 224.

(l) See *Tebbs v. Carpenter*, 1 Mad. R. 290, where *Raphael v. Boehm* and other English cases are reviewed.

(m) 1 Johns. C. R. 620.

(n) 2 Wen. 77.

cause was decided upon another ground. The case of *Schieffelin v. Stewart* has not been overruled; and, as far as my observation extends, it stands as an authority to be followed in similar cases.

"The whole doctrine underwent an examination in *Wright v. Wright*,^(o) where *Schieffelin v. Stewart* was cited. Nott, J., in delivering the opinion of the Court of Appeals, expressly admits there are cases where common justice requires compound interest to be allowed, and where great injustice would otherwise be done. And he states the only difficulty to be in drawing, with precision, the line of distinction between those cases to which the rule should or should not be applied.

"In the case before the court, one hundred and forty-five shares of Manhattan Bank stock, amounting to eight thousand seven hundred dollars, and belonging to the estate of Alexander McLachlan, were transferred in 1819, on the books of the bank, to the name of the administrator, the defendant, David Gardiner. He admits those shares were standing in his name at the time of putting in his answer; and, that he received the dividends. He further admits, that the moneys received by him on account of the personal estate, and including the dividends upon the Manhattan stock, (after disbursements as administrator,) were mingled with his own moneys and used and appropriated by him as his occasions required; but, having kept no separate account relative to those moneys, he cannot set forth how, at all times, the same have been disposed of, vested or employed. The stock must be considered as held in trust for the next of kin; and he ought to account for the dividends *pro tanto*. Upon the strength of the admission that such dividends have been used and appropriated by him as his occasions required, he ought to be charged with interest upon the several dividends from the time they were respectively received. On this principle the account should be stated from the year 1819, upon the one hundred and forty-five shares of Manhattan stock. If the defendant has since sold out the stock and invested the money elsewhere, it should be followed, and whatever dividends or income he has received from re-investments ought, in like manner, to be accounted for with interest. This mode of computation does not require annual rests. It does not convert interest into principal, for the purpose of computing interest upon the whole as principal from year to year, and thereby charge the defendant with compound interest. It only charges him with the sums he may have received from time to time, and with lawful interest on each sum from the time it was received to the making of the master's report. This, added to the capital or value of the investment, will then constitute the property in his hands to be distributed. Such a mode will not be at variance with the directions which were given by the late Chancellor in *Clarkson v. De Peyster*, which were sanctioned by the Court of Errors."

It has been further established, that if an executor or other trustee mixes trust funds with his private moneys, and employ them both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest, on the amount of the trust fund so employed. And it should seem

(o) 2 McCord C. R. 185.

to be now settled, in England, that an executor who, being a trader, and having, of course, an account with his banker, places the assets at his banker's in his own name, by that means increasing the balances in his favor, acquiring additional credit, and enjoying in his business the advantages naturally arising from that circumstance, must be considered as having employed the money for his own benefit, and must, therefore, be charged full legal interest.(p)

Where an executor mixed the funds of the estate with his own, and loaned out the same from time to time on interest, without keeping separate accounts thereof, it was held to be a violation of his duty, by which he became liable to pay interest on the moneys belonging to the estate.(q) And if he mixes money belonging to the estate of the decedent with his own, and uses the same so that he has it not on hand to pay over to the persons entitled to it whenever it shall be called for, he may be charged with interest on such money. But the mere neglect of an executor or administrator to invest money belonging to the estate, which money he may be called upon to pay to the legatees or distributees at any moment, is no ground for charging him with interest, where such money is kept ready in bank, or otherwise, to be paid over when called for.(r) Where, however, the administrator had cash of the estate in his hands for nearly six years, and there was no explanation of the long delay which took place in the adjustment of the estate; nor did it appear where the funds had been deposited or how employed, with the exception of five hundred dollars, loaned on bond and mortgage; it was held that, by the long delay in settling his account, the use of the money might be inferred and interest be chargeable; and that, as it was in the power of the administrator to have had his account settled and the funds paid over eighteen months after the grant of his letters, he should be charged with interest from that time, unless he showed that the money had been kept in bank, or otherwise, ready to be paid over when called for.(s)

Again, where an executor mixes up the trust funds with his own, or neglects to keep regular accounts of the investments, and of the interest received upon such funds from time to time, he is chargeable with interest, as if the fund had been kept invested upon interest, payable periodically, and as if the payment had been made by him from the interest and principal thus received and in hand when the payments from the trust fund were made by him. And interest should not be counted upon the capital fund for a term of years, with a deduction of the payments and interest on such payments in the meantime.(t)

In *De Peyster v. Clarkson*,(u) it was stated that it is the duty of trustees and guardians to keep the moneys belonging to the trust estate properly invested. Circumstances, it was said, may justify a deviation from that duty, and those circumstances may be so strong as to require the trustee, in the exercise of a sound discretion, to refrain from making

(p) See *Wms*: 1570, and cases cited.

(q) *Kellett v. Rathbun*, 4 Paige, 102. See, also, *Case v. Abell*, 1 Paige, 393; *Hart v. Bulkley*, 2 Edw. Ch. Rep. 70; *Coll v. Lasnier*, 9 Cowen, 320; *Taylor's Prec. of Wills*, 454.

(r) *Jacot v. Emmett*, 11 Paige, 142. See, also, *Burtis v. Dodge*, 1 Barb. Ch. Rep. 78.

(s) *Hasler v. Hasler*, 1 Bradf. Surr. Rep. 248. See, also, cases cited.

(t) *Speare v. Tinkham*, 2 Barb. Ch. Rep. 211.

(u) 2 Wen. 77.

investments; but those circumstances rarely occur, and, when they do, the trustee is bound to state them to the court as the reason for his otherwise culpable neglect. Ordinarily, the duty of the trustee must predominate, and he is bound, within a reasonable time to be allowed him for the purpose, to see that the moneys which come to his hands in the course of his agency are securely and beneficially invested for the benefit of those for whom he acts; and, if that duty be neglected, he must be made chargeable with the interest of the unemployed funds, unless satisfactory cause be shown for the omission to invest them. Six months from the receipt of the money was deemed a reasonable time within which the investment must be made. If the executor or trustee neglect to make investments, they are chargeable with the interest of the unemployed funds, commencing six months after the receipt of the moneys.

A trustee, it was determined, is not permitted to put the income of an estate into his own pocket, to be accounted for at the termination of the trust, and in the meantime appropriate the capital to the payment of the annual expenses of the trust. The *interest* or *income* should first be applied and exhausted in the support of the *cestui que trust*, if infants, and to answer the other exigencies of the trust, before the principal is encroached upon. Where annual disbursements are required, and they are equal to the whole income of an estate, and the trustee is charged with interest on the income used by him and not invested, he will have to pay the interest as it falls due; but if the disbursements or investments that he makes are less than the income, then he will not be required to pay the interest which he may owe as it falls due, but it will be carried into the disbursement fund, which bears no interest. This rule, therefore, does not allow compound interest.

If executors retain money in their hands, belonging to infants, for several years, without any good reason for so doing, they will be charged with the interest which they might have received thereon.^(v)

The idea of an equitable rate of interest less than the rate established by law, although adopted in some cases in England in charging interest against executors and trustees, has never been adopted in this state.^(w) An executor or administrator, therefore, whenever he is liable for interest, will be charged with the same at the full legal rate.

Of the Allowance of Executors' Commissions.

The above section, numbered 58, prescribes the rate of commissions to be allowed to executors and administrators as compensation for their services, and provides also for the allowance of their actual and necessary expenses. Where there are two or more executors or administrators, the commissions are to be apportioned between or among them, according to the services rendered by them respectively. The mode of ascertaining or estimating the services is not prescribed, and in practice, to give effect to this provision, may be attended with some difficulty. The whole commissions should be apportioned among all the executors equally; or upon some equitable principle, in reference to

(v) *Stephens v. Van Buren*, 1 Paige, 479.

(w) *Clarkson v. De Peyster*, Hopk. 426.

their respective services in the administration of the estate.(x) The 59th section provides for the case of a specific legacy to the executor as compensation for his services.

The former provision relative to the executor's or administrator's compensation, and the allowance for expenses, was contained in the act of 15th April, 1817,(y) and directed a rule to be established by the Court of Chancery, which was done on the 16th October, 1817, by a general rule,(z) which is adopted in the present statute above recited. The part in reference to expenses, is in the words of the act, and conformable to the exposition of Chancellor Sanford.(a)

The executor or administrator is absolutely entitled to the allowance of his commissions under the provisions of the Revised Statutes, and the surrogate has no discretionary power to withhold them, or to state a balance against the administrator, excluding his legal commissions. It is not necessary now to inquire whether a court of equity, upon a complaint brought against an executor or administrator, has the right to disallow commissions where there has been a fraudulent mismanagement of the estate. The surrogate takes no power by implication; and the direction of the statute is positive, that, upon the settlement of the account of executors and administrators, in a proceeding before him, the surrogate shall allow them certain specified commissions for their services, over and above their expenses; except in those cases where a specific compensation for such services is allowed by the will of the decedent. The executor or administrator, therefore, has the same right to be credited his legal commissions for receiving and paying out the moneys of the estate, as he has to be credited for moneys paid by him for debts and funeral expenses; and the surrogate is not authorized to decree the payment of costs out of the estate of the decedent in his hands, to the exclusion of his commissions for receiving and paying out moneys, if the amount in his hands is not sufficient to pay both.(b)

The highest allowance under the statute to executors and administrators, in full for all their personal services, is five per cent. for receiving and disbursing; that is, two and a half per cent. for receiving, and two and a half per cent. for disbursing the same money, or paying it over to those who are entitled to it under the trust, or upon the final settlement of their accounts. Where an account is taken without annual rests, the commissions are to be computed upon the aggregate amount of the receipts and disbursements; so as to allow five per cent. for receiving and disbursing the first thousand dollars, two and a half per cent. upon the next four thousand, and one per cent. for the residue. In cases where the court directs annual rests to be made, for the purpose of charging the executor, or administrator, or guardian, with the interest upon the annual balances, the commissions are to be computed in the same manner upon the amount actually received and disbursed or paid over during each year, and in the same way upon the final balance; in such a manner, however, that the whole amount of commissions shall in no case exceed five per cent. upon the whole

(x) *Valentine v. Valentine*, 2 Barb. Ch. Rep. 430.

(y) S. L. 1817, 292.

(z) *Vide* 3 John's. Ch. Rep. 630.

(a) 1 Hopkins' Rep. p. 43. See Reviser's Notes, 3 R. & or. S. App. 644.

(b) See *Halsey v. Van Amringe*, 6 Paige, 12; *Dakin v. Demming*, 1b. 95.

amount which may come to the executor or other trustee.(c) And where there are several executors or administrators, the commissions are charged upon the aggregate received by all the executors or administrators, and not upon the aggregate received by each one of them.(d)

The investment or re-investment of the fund, from time to time, upon new securities, for the purpose of producing an income therefrom, is not such a paying out of the trust moneys as entitles the executor, guardian or trustee to commissions for paying out the same, within the intent and meaning of the statute on this subject, unless such securities are finally turned over to the *cestui que trust* as money, or otherwise applied in payment on account of the estate. Neither is the executor, guardian or trustee entitled to charge a new commission for the collecting or receiving back of the principal of the fund which he has so invested. But he will be entitled to commissions upon the interest or income of the fund produced by such investments, and received and paid over by him.

The statute gives a certain allowance by way of commissions for receiving and paying out moneys by executors, guardians, &c., without specifying how much is to be allowed for receiving, and how much for paying out the same. And it may sometimes happen, upon a loss of the fund without any fault on the part of the guardian or trustee, or upon a change of trustees, that the guardian or trustee may be entitled to compensation for one service and not for the other. In such cases the language of the statute must be construed with reference to the decision of Chancellor Kent, *In the Matter of Roberts*,(e) where he first established the allowance to be made in such cases, in conformity with the directions of the act of April, 1817, that is, to allow one-half commissions for receiving, and one-half for paying out the trust moneys.(f)

An executor cannot make periodical rests in his accounts, in order to entitle himself to full commissions at such rests, where annual rests are not directed to be made for the purpose of compelling him to pay interest upon periodical balances which ought to have been invested by him.(g)

Executors in making, in pursuance of the directions of the will, an investment of a portion of the testator's estate, at interest, and in collecting and paying over such interest, to a person to whom they are directed by the will to pay the same annually for life, act as executors, and are entitled only to such commissions on the sums so received and paid over, as are allowed by this statute to executors. And in computing the commissions to which the executor is entitled, such annual income is to be added to the total amount of moneys of the estate already received by the executor, and the commissions are to be calculated upon each annual payment at the rate prescribed by the statute, with reference to the sum total of moneys which have come into the hands of the executor thus ascertained.(h) Thus, where the testator, by his will, directed his executors to place and keep \$5,000 at interest, as the share of J., and to receive such interest and pay the same over yearly and every year to the said J. during her life, and then to divide

(c) *In the Matter of the Bank of Niagara*, 6 Paige, 216.

(d) *Valentine v. Valentine*, 2 Barb. Ch. Rep. 430.

(e) 3 John's. Ch. Rep. 43.

(f) *In the Matter of Kellogg*, 7 Paige, 267.

(g) *Husack v. Rogers*, 9 Ib. 461; *Bennett v. Chapin* 3 Sandf. S. C. R. 673.

(h) *Drake against Price*, 1 Selden, 410. But see *Fisher v. Fisher*, 1 Bradf. Surr. Rep. 335. See, also, *Westerfield v. Westerfield*, 1 Bradf. Surr. Rep. 198; *Holley v. S. G.*, 4 Edw. C. R. 284.

the principal among her lawful heirs, and the executors had had the said \$5,000 invested for several years, and had received the annual interest thereof, amounting to \$300 per annum during that time, and had received and paid out more than ten thousand dollars belonging to the estate of the testator, besides the said \$5,000 dollars, and had been allowed and had received the sum of five per cent. on the first one thousand dollars thereof, and two and a half per cent. on the next four thousand, it was held that they were entitled to retain only one per cent. on the amount of the annual interest, as it was received and paid over by them.(i)

Commissions are not chargeable upon legacies, unless indirectly, by way of abatement, when the general estate is insufficient to pay them.(j)

If a legacy be given to an executor in trust, double commissions will not be allowed.(k) And generally, commissions in the two-fold capacity of executor and trustee will not be allowed.(l)

The present section of the statute authorizes the charging of the commissions only on the moneys received or paid out. The calculation of the commissions, however, is frequently made on the gross valuation stated in the inventory and appraisement which has been filed, and any increase which may have subsequently taken place. In all cases where the goods and property are disposed of and distributed as money, this mode of computation is conformable to the statute. Where an executor, instead of calling in the money upon good and collectable bonds and mortgages or other securities belonging to the estate of the testator, for the benefit of the legatees, transfers such securities to a third person for the use of such legatees, with their assent, he is entitled to the same commissions as if he had actually received and paid over the money, or invested it as directed by the will.(m)

But where the goods have been sold by the executor or administrator, and have brought less than their appraised value, the commissions can be charged on the amount realized from such sale only; because that amount is the only money received or paid out by the executor or administrator as to that portion of the property. So, also, the executor or administrator cannot be entitled to commissions on the value of chattels specifically bequeathed. The articles so bequeathed are to be delivered *in specie* to the legatees, and the discharge of the legacy may not be considered as so much money received and paid out. So, in *Burtis v. Dodge*,(n) it was held that an executor was not entitled to

(i) 1 Selden, 431.

(j) *Westerfield v. Westerfield*, 1 Bradf. Surr. Rep. 198.

(k) *Ib.*

(l) *Holley v. S. G.*, 4 Ed. Ch. Rep. 244; *Valentine v. Valentine*, 2 Barb. Ch. Rep. 430.

(m) A receiver is entitled to his commissions on the *value* of all the personal property and things in action of which he has become possessed, and which he transfers and delivers, *in specie*, under the order of the court. *Be melt v. Chapman*, 3 Sandf. Sup. Ct. Rep. 673. A trustee in passing his accounts, on being discharged from his trust and transferring the property to his successor, is entitled to commissions on the capital of the estate, consisting of stocks and bonds and mortgages, although the same came to him from his predecessor, and were neither invested nor converted by him. He is also entitled to commissions on real estate which his predecessor bid in on the foreclosure of mortgages thereon; the same being in equity personalty, so far as the trust estate was concerned. And it is considered that the same principle extends to real estate generally, vested in trustees. *In the Matter of De Peyster*, 4 Sandf. Ch. Rep. 511.

(n) *Cairns v. Chaubert*, 9 Paige, 160.

(n) 1 Barb. Ch. Rep. 77.

commissions on the share of a legatee, which share the will directed to be deducted from the valuation of a farm, specifically devised to the legatee, upon his paying to the executors the residue of the appraised value of such farm. A specific legacy of money, however, even if that money be particularly described in the will as a special deposit in a bank, is, without doubt, to be included in the sum charged with commissions in the general account; but stocks or securities specifically bequeathed and transferred or delivered to the legatee in the same state in which they were held by the testator, cannot properly be taken into the estimate in computing the commissions. Where an executor dies before he has converted the personal property of the testator into money, or otherwise disposed of it in the execution of his trust, he is not entitled to commissions upon the value of such property.(o)

The commissions upon the moneys received and paid out are in lieu of all personal services of the executor or administrator, and he will not be allowed any other or further recompense, however great may have been his trouble or loss of time in conducting the administration. Nor is the case altered by the executor's renunciation of the executorship, and his afterwards assisting in it; nor although it should appear that he has deserved more, and has benefited the estate to the prejudice of his own affairs. And even where an executor in trust, who had no legacy, in a case in which the execution of the office was likely to be attended with trouble, at first declined, but afterwards agreed with the residuary legatee, in consideration of a hundred guineas, to act in the executorship, and on his dying before the execution of the trust was completed, his executors filed a bill to be allowed that sum out of the trust money in their hands; the court refused the claim, observing that independently of the executor's having died before the trust was executed, such bargains out to be discouraged, as tending to dissipate the property. So, a surviving partner, being executor, is not entitled without express stipulation, to any allowance for carrying on the trade after the testator's death. Again; if a solicitor or attorney, who is an executor, does professional business himself for the benefit of the estate, he is not entitled to be paid his bill of costs for such services; it would be placing his interest at variance with the duties he has to discharge.(p)

In support of this last proposition, Mr. Williams cites *New v. Jones, coram, Lord Lyndhurst, C. B., Exchequer, Aug. 9, 1833, 2 Younge's Repts., also Wilson v. Carmichael, 2 Dow & Clark, 51.* But it seems the law is otherwise in this state, and a receiver, executor or guardian here, who acts as attorney or solicitor for the estate which he has in trust, will be allowed, besides his commissions, his legal taxable costs in suits prosecuted or defended by him for the estate.(q)

The executor or receiver is not, however, entitled to charge for extra counsel fees to himself, in addition to the legal taxable costs in suits prosecuted or defended by him as attorney or solicitor; nor is he entitled to any allowance in the character of counsel for himself or his

(o) 1 Barb. Ch. Rep. 77.

(p) See Wms. on Exrs. 1316.

(q) See *In the Matter of the Bank of Niagara*, 6 Paige, 215.

co-executor or receiver, in relation to any other matter. The employment of counsel, and the payment of a proper allowance for such services, when necessary, requires the exercise of a sound discretion on the part of the executors or receivers, or the trustee of the fund out of which such services are to be paid. It would, therefore, be as unsafe to allow an executor, receiver or other trustee, to contract with and pay himself for such extra services, as it would be to allow him to become the purchaser of the trust property which it is his duty to sell to the best advantage for the benefit of the estate. If he employs third persons as counsel, and where he has no interest in employing and paying them for services which are not absolutely necessary, there is comparatively little danger that the estate entrusted to his care will be charged with counsel fees which might safely have been dispensed with. No allowance for extra counsel fees to himself, can therefore be made to an executor, receiver or other trustee, upon the settlement of his accounts.(r)

Special services by the executor are not entitled to any extra compensation, unless it be so expressly provided by the will. In *Clinch v. Eckford and others, Executors, &c.*,(s) where the testator appointed his confidential clerk and bookkeeper one of his executors, and directed the co-executors to allow him such yearly compensation for his special services, as they or a majority of them should deem proper; it was held, that such clerk was not entitled to a salary for the ordinary discharge of his duties as one of the executors; but merely to a salary in addition to the usual commissions, while he continued to perform extra services; and that this direction in the will was only intended as *an authority* to the other executors to allow him a salary for extra services, in addition to the compensation allowed by law, so long as they thought proper to require such extra services to be performed by him.

Without an authority contained in the will for that purpose, the executors are not authorized to employ one of their number to perform extra services as clerk, in keeping the accounts of the estate, and to allow him a salary for his services out of the property, in addition to the commissions allowed by law.(s)

If an agent has been necessarily employed in the collection of rents of leasehold estate, by executors under a trust in the will, his commissions may be allowed; but if the executor himself has performed the service, he cannot receive any other compensation than his regular statutory commissions.(t)

Where the executors employed a person not authorized to practice, to foreclose a mortgage due to the estate of their testator, and he foreclosed the same in the name of another person, as solicitor, but from the ignorance of the person so employed by the executors, the mortgage was irregularly foreclosed, so that a part of the debt was lost; such executors, it was considered, were answerable to the legatees for the amount of such loss.(u)

(r) See *In the Matter of the Bank of Niagara*, 6 Paige, 215.

(s) 8 Paige, 412. See, also, *Fisher v. Fisher*, 1 Brad. Surr. Rep. 335.

(t) *Fisher v. Fisher*, 1 Brad. Surr. Rep. 335. See, also, *In the Matter of Livingston*, 9 Paige, 440.

(u) *Wakeman v. Hazleton*, 3 Barb. S. C. R. 148.

Of the Allowance of the Executors' Expenses.

An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office, except those which arise from his own default.^(u) In *Elliot v. Lewis*,^(v) an administratrix who had filed a bill of foreclosure, and, with her husband, had been obliged to come from Washington city to New York, to be examined before a master, was allowed a charge of sixty dollars for the expenses of the journey.

Where the decedent died at a public hotel in New York, at a distance from home, and the most prompt means for the communication of the intelligence to his family were proper and requisite, both for the security of his estate, adequate preparation for the transportation and burial of his body, and the avoidance of expense consequent upon delay; it was held that the reasonable expenses of a special messenger to the relatives of the deceased, at Philadelphia, informing them of his decease, should be allowed in the administrator's accounts; and the administrator's own expenses in accompanying the body to Philadelphia, were considered as a funeral charge.^(w)

Generally speaking, an executor who has proved the will, or a person taking out letters of administration, cannot retire from his duty, but must collect the estate himself. However, an executor is justified in having recourse to an agent to collect the assets, in cases where a provident owner might well employ a collector; and the executor will therefore be allowed the expense so incurred in his accounts.^(x)

The travelling expenses of an administrator, when engaged on the business of the estate, always constitute a proper charge, unless he has been in some default.^(y) Whether if he drive his own horse and carriage in travelling for the estate, he can charge for their use, has been made a question. He should not be allowed to make any profit by such a charge. The price for which he could have hired a conveyance for the purpose would not, therefore, determine the amount of the allowance. The policy of the law, it is apprehended, is against the allowance of such a charge.

He is entitled to all proper expenses to which he has been subjected in the care and management of the estate, and may employ an agent or clerk, and charge the estate with the expenses, where, from the peculiar situation of the property, or from its nature, it was beneficial for the estate to subject it to that extra expense.^(z)

"So, on one occasion, it was holden that, from the nature of the accounts, the executor was justified in employing an accountant, and that the expense ought to be allowed to the executor.^(a)

"Again; if an executor pays an attorney for his trouble and attendance in the transacting and conduct of the testator's affairs, he ought to be allowed and repaid what he so pays. But an executor is

(u) Wms. 1574-5.

(v) 3 Edw. Ch. Rep. 40.

(w) *Hasler v. Hasler*, 1 Brad. Surr. Rep. 248.

(x) Wms. 1580-1, and cases cited.

(y) *Hasler v. Hasler*, 1 Bradf. Surr. Rep. 250.

(z) *Vanderheyden v. Vanderheyden*, 2 Paige, 288. The executor's charges for expenses must be reasonable. If necessary, an agent may be employed at the cost of the estate.

Glover v. Holley, 2 Bradf. Surr. Rep. 291.

(a) *Henderson v. M'iver*, 3 Madd. 275.

not entitled to be allowed, without question, the amount of the bill of costs which he has paid, *bona fide*, to the solicitor to the trust; and the court without regularly taxing the bills, will moderate their amount."(*b*)

Where an estate is so situated that legal advice is proper to direct the course of the executors, or where they must bring suits to recover part of the estate, or defend suits brought against them, counsel must be employed; and where they are employed to obtain what is honestly supposed to be the rights of the estate, the estate ought to pay the reasonable counsel fees. But where executors neglect to settle and pay, and are sued by creditors, or cited by heirs, and employ counsel to defend them in their iniquity, no counsel fees should come from the estate. When heirs are asking from executors what is unreasonable, they may defend against this, and the heirs ought to bear the expense of their unjust claim.(*c*)

Where it was considered that the executors acted in good faith, and for the apparent interest of the estate, in bringing a suit in the name of a third person, under the advice of counsel, for the purpose, if possible, of avoiding the forfeiture of the debt, in case usury was proved, that defence having been set up, it was held that it was right to allow them the whole costs of the litigation; although they might, perhaps, have been excused from paying the defendant's costs, if the suit had been brought in their own names as executors. Where an executor in such a case acts in good faith, under the advice of counsel, and apparently for the interest of the estate he represents, he ought not to be subjected to a personal loss, because the result of his exertions was not quite as beneficial to the estate as a different course of proceeding might have been.(*d*)

Where an executor in his accounts charged three items, amounting to \$204 75, for the costs and counsel fees in resisting a successful application to the surrogate, to compel the executor to give security, and two items, amounting to \$119 75, for resisting an application to the surrogate to compel the executor to account, which application was granted, and was affirmed with costs by the Chancellor, on appeal; it was held that, in the first case, the allowance of costs to the executor was in the discretion of the surrogate; and he, not having allowed costs for resisting the successful application, the executor was not entitled to charge them against the estate. And the Chancellor, as well as the surrogate, having decided that the executor was wrong in his objections to the application to compel him to account, and he having been personally charged with the costs of the appeal, upon that ground, it was wrong to charge the estate with the costs of that unsuccessful resistance of a legal right.(*e*)

An executor should be allowed, as against the estate, his costs and expenses incurred in suits brought or defended by him, in good faith, for the benefit of the estate, and not merely to enforce or defend his own rights.(*e*)

He is not entitled to charge the estate with a counsel fee, paid by him, upon the final settlement of his account before the surrogate; or for drawing up his account in a proper and legal form, on such final settlement.(*f*)

(*b*) See *Wms.* 1581, and cases cited.

(*c*) *Case of Sterrett's Appeal*, 2 Penn. Rep. 426.

(*d*) *Collins v. Hoxie*, 9 Paige, 87.

(*e*) *Hosack v. Rogers*, 9 Paige, 461.

(*f*) *Burtis v. Dodge*, 1 Barb. Ch. Rep. 77.

With respect to the allowance of interest to executors, upon sums advanced by them for the purposes of their trust, it has been held, that if an executor borrows money, or advances it out of his own pocket, to pay debts of his testator which carry interest, or satisfy some of his testator's creditors who are very importunate and threaten to bring actions, he is entitled to an allowance of interest for the money so advanced or borrowed.^(g)

A charge of interest by an administrator will be viewed, however, with caution, and the circumstances offered to sustain it will be examined with scrupulous care. But circumstances may exist which will not barely justify, but commend an advance of money by the administrator, and entitle him to the allowance of interest.^(h)

A provision made by the will for specific compensation to the executor, is, by the above section, numbered 59, to be deemed a full satisfaction for his services, in lieu of the commissions or his share thereof, unless such executor shall file with the surrogate a written renunciation of all claim to such specific legacy. The renunciation may be filed at any stage of the administration. The executor need not elect whether he will accept the legacy or claim his commissions, until he has sufficiently ascertained which will be the more to his advantage. Such a legacy is swept away by debts, or abates in case of deficiency, the same as any other general legacy. The section does not, perhaps, apply to the former case; but it is easy enough, on discovering the provision made by the will to be inadequate, to file the renunciation and thereby escape all question. (For form of the renunciation, see Appendix, No. 73.)

Executors or administrators are entitled to be allowed the reasonable actual sustenance of the widow, out of the estate of her husband, during her quarantine. The statute relative to "Estates in Dower," provides as follows:

Sec. 17. A widow may tarry in the chief house of her husband, forty days after his death, whether her dower be sooner assigned to her or not, without being liable to any rent for the same; and in the meantime, she shall have her reasonable sustenance out of the estate of her husband.^(i, h)

This provision being general, it must be construed to apply to the case of a solvent as well as of an insolvent estate. But the allowance is only intended to apply to the sustenance of the widow herself. No provision is made by law for the maintenance of the children of her deceased husband, out of an insolvent estate, beyond the exempt articles allowed to the widow for that purpose.⁽ⁱ⁾

Of the Effect of the Final Settlement.

The above section, numbered 65, defines the facts of which the settlement and allowance of the account by the surrogate, or upon appeal, shall be deemed conclusive evidence against all persons interested in the estate who have been duly cited.⁽ⁱⁱ⁾

(g) Wms. 1581-2. (h) *Liddell v. M'Vickar*, 6 Halsted, 44. (hh) 1 R. S. 742; 4th ed. 157.

(i) S. L. 1842, 194; 2 R. S. (4th ed.) 270, sec. 11; *Johnson v. Corbett*, 11 Paige, 265.

(ii) After a cause pending before a surrogate has been submitted to him for decision, and the parties have separated, it is too late for one of the parties to withdraw his claim. *Clowes*

There has been occasion, at a previous page of the remarks upon the present subject, to speak of the extent and sufficiency of the protection afforded to the executor or administrator, by the settlement and allowance of his accounts by the surrogate, and the conclusiveness of the proceedings upon the parties in interest, and attention was called to the section now under consideration. The necessity for accuracy and diligence in ascertaining the names and residences of the persons interested in the estate, and in making due service of the citation, was there adverted to. The practice with reference to the appearances of the parties before the surrogate, and on perfecting the appearances of minors interested in the estate, was also pointed out. It may now be further observed, that it is not settled whether the sentence of the surrogate is final, in the case of infants for whom a guardian has not been duly appointed, or of those persons under disability, bound only by publication.(j) With regard to infants who did not duly appear, or were not legally represented on the accounting, it was before suggested, that their rights were not in any way affected by the proceedings; but the point remains to be decided. As to those persons under disabilities, bound only by publication, it is probable that the executor or administrator will always continue liable for their claims, until they shall be barred by reason of staleness, or the application of the rules prescribing the limitations of actions.

The four subdivisions of the section cover nearly every question which can possibly be raised relative to the account of the executor or administrator, or his proceedings in the administration of the estate.

With respect to the first, it has been held that a party to the accounting cannot be permitted in any subsequent original suit whatever, to object against any debt or legacy paid by the executor, charged in his final account, and passed upon by the surrogate. The decree of the surrogate is absolute and final. The remedy is an appeal to the Chancellor. It becomes pleadable in every court as the final sentence and judgment of a competent tribunal, upon every matter which it professes to decide, and which is within the jurisdiction of that forum. To suppose that the 65th section is confined to the mere fact that the payments have been made—dispensing only with the preservation of vouchers—seems to be inconsistent with the object of the statute, and destructive of its utility. The clause in question is, "that the final settlement of the executor's accounts made in the mode prescribed, shall be conclusive evidence of the following facts, and no other. 1st. That the charges made in such account for moneys paid to creditors, legatees, next of kin, and for necessary expenses, *are correct*." This phrase cannot mean less than this, that the validity of a debt, and the right of a legatee, is as much pronounced correct as the fact of his reception of the money.(j) The other subdivisions are so framed as to

v. *Van Antwerp*, 4 Barb. S. C. Rep. 416. Upon the final settlement of the accounts of executors before the surrogate, legatees who have appeared by their counsel before the surrogate, and are contesting the executor's accounts, are not competent witnesses, although upon being offered as witnesses, they have assigned their claims upon the estate. But a legatee who has been paid the full amount of his legacy, and has executed to the executors a receipt in full, is a competent witness. *Mesick v. Mesick*, 7 Barb. S. C. Rep. 120.

(j) See *Kellett v. Rathbun*, 4 Paige, 102; *Wright & others v. Trustees, &c.*, 1 Hoff. C. R. 202.

(jj) 1 Hoff. Chan. Rep. 214-15.

leave scarcely any room for a doubt as to their construction. The sentence or decree of a surrogate, upon the final accounting of an administrator before him, is, unless appealed from, conclusive as to the amount of the personal estate with which such administrator is chargeable up to the time of the accounting; and it cannot be reviewed in a collateral suit.^(k)

But the surrogate's settlement and allowance of the executor's or administrator's account, is not conclusive upon a creditor who does not appear before the surrogate on the accounting, where the executor or administrator has already paid the debt to another person, representing himself as the owner of the claim, and entitled to receive the amount, but who had actually previously transferred the claim to a *bona fide* holder, who brought the suit, and the surrogate's decree awarded the dividend of the estate due on the claim to the administrator, as a creditor of the estate, and such dividend was received and retained by him accordingly. Thus where the intestate died 27th October, 1842, and at the time of his death owed a note dated March 15th, 1841, payable to J. O. H. or bearer, for \$244 80, to be paid April 1st, 1843, with interest at six per cent., to be paid annually, and J. O. H., the payee of the note on the 1st May, 1841, transferred the note to The Bank of Poughkeepsie, in part security for the payment of certain of his liabilities to the bank, and soon after the grant of the letters of administration of the goods, &c., of the intestate, which took place on the 3d June, 1843, the payee, in his own name and for his own benefit, presented to the administrator a claim against the estate of the intestate on account of this note and other demands, and the administrator did not contest the claim but admitted it, and believing that J. O. H. was the owner and holder of the note, and before any notice or knowledge of the claims of the bank, and in June, 1844, advanced to J. O. H., on account of his claim, a considerable proportion in cash, and afterwards paid a further sum upon an agreement with J. O. H. that such advance was to be deemed a payment of his claim, and J. O. H. agreed to give the administrator a receipt in full for his claim on the estate, and the administrator and administratrix published the notice prescribed by the statute for the presentation of claims, which notice required such claims to be exhibited on or before May 25th, 1845, but the president, &c., of the Bank of Poughkeepsie, did not present any claim, and the administrator had no notice or knowledge of their claim until January 1846, and the administrator and administratrix on the 2d June, 1845, took out a citation requiring the creditors and next of kin of the intestate to appear before the surrogate on the 29th July, 1845, to attend the final settlement of their accounts, which citation was duly issued, published and served in such manner as the law directs,^(l) and on the 29th July, 1845, the surrogate made a decree reciting the citation and return thereof with affidavits of the service duly verified, and that none of the creditors or next of kin appeared to oppose, and further recited that the claims presented amounted to \$2615 17, specifying them, including J. O. H. \$320 35, and directed that to the creditors of the de-

(k) *Stiles v. Burch*, 5 Paige, 132.

(l) How service came to be made upon the bank when the administrator had no notice or knowledge of their claim until the January following, is not quite clear.

ceased, the administrator and administratrix should pay ratably at the rate of sixty cents on the dollar in sixty days from the date of the decree, and J. O. H. attended on the final accounting, and admitted payment to him of his claim by the administrator, and the amount was credited in the final account as a claim of the administrator against the estate, J. O. H. stating that the note had been mislaid so that he could not produce it, and it appeared that the said sum of \$320 25, awarded to the administrator, as due to him, as a creditor of the estate, was so awarded on account of the same promissory note then held by the Bank of Poughkeepsie, and that sixty cents on the dollar upon the said claim was received by him accordingly: It was held in a suit by the Bank of Poughkeepsie against the administrator, to recover the money so retained, that the payment by the administrator of the amount of the note to the payee, was a payment in his own wrong; that the non-production of the note by the payee, was of itself evidence of his want of right; that the surrogate's decree was not conclusive against the plaintiffs that the defendant was entitled to the money; that the amount retained by the administrator under the decree on account of the note, was held by him for the plaintiff's use at their election; and that they had a right to proceed against the defendant for the money, as received to their use, or to proceed against the estate for the amount of the note.^(m)

Again, the account provided for by the statute, though termed a final account, and the settlement thereof, though also termed final, are not in any broad sense possessed of that character. Their finality is limited to the particulars enumerated in the four subdivisions alluded to of the above section sixty-five; and even as to those particulars, they are final only as to such persons as were notified in the particular manner required by the statute. The executor or administrator on the accounting gets no adjudication; that no other assets are chargeable to him, as having been received, than those which are stated to have been received. He may still be charged for not collecting debts collectable, and not stated in the account, and with interest on both these classes of charges; and it is quite obvious, that besides these, and probably other matters relating to the time prior to the settlement of the accounts, the executor may discover, and be able to get possession of assets, the existence of which was unknown at the time of the settlement, and that as to all these, his duties and the rights of creditors and others interested in the estate of the deceased, remain unaltered by these proceedings upon the so called final accounting.⁽ⁿ⁾

The 66th section of the act formerly provided that the 65th section shall not extend to any case where an executor was liable to account to a court of equity, by reason of any trust expressly created by any last will or testament. This section, it was considered, could apply only to the few permitted cases of express trusts.^(o) In England, it is said, in respect to their ecclesiastical courts, where there is anything in the nature of a trust to be executed, an injunction or prohibition will

(m) *The President, &c., of the Bank of Poughkeepsie* agt. *Hasbrouck*, 2 Selden, 216.

(n) *Bank of Poughkeepsie* agt. *Hasbrouck*, 2 Selden, 216, per *Johnson, J.*

(o) 1 *Hoff. Chan. Rep.* 215.

go; for the Ecclesiastical Court has no jurisdiction over trusts: thus, the Court of Chancery will grant an injunction to stay the proceedings in the spiritual court, where a sum of money is given to a trustee upon trust for a legatee, and he sues for payment into his own hands. So, if a sum of money is left to an executor in trust, the spiritual court cannot entertain a suit against him at the instance of the *cestui que trust*. But where there is the bare duty of an executor to be performed, and there is no trust but what belongs to all executorships, in such a case, it should seem, no injunction can be obtained to restrain proceedings in the Ecclesiastical Court against the executor, to enforce the performance of that trust. Thus, in *Grignion v. Grignion*,^(p) a sum of money was left to executors, in trust, to invest and pay the interest to A. for life, and after A.'s death, to divide the principal among his issue on their respectively attaining the age of twenty-one, with benefit of survivorship till that age: A. died; his only three children attained their majority, and the shares of two of them were paid over: and Sir John Nicoll held, that the Prerogative Court ought to proceed against the executor, to enforce payment of the share of the third; the learned judge considering that the character of trustee was at an end, and that of executor alone was subsisting.^(q)

Whether, previous to the amendment of 1850,^(r) executors clothed with a testamentary trust might not avail themselves of the general provisions of the statute relative to the final settlement of an executor's accounts, is not any longer a question necessary to be discussed, since any doubt that might have existed on that point has been removed by the act of 1850. By the terms of that law, any trustee created by any last will or testament, or appointed by any competent authority to execute any trust created by will, or any executor or administrator, with the will annexed, authorized to execute such trust, may, from time to time, render and finally settle his accounts before the surrogate, in the manner provided for the final settlement of the accounts of executors and administrators. And, by law, executors may have a final settlement of their accounts at their own instance, and though not cited by persons interested. This privilege is therefore extended to testamentary trustees.^(s)

By the above section, numbered 71, the surrogate is authorized, on the final settlement and allowance of the executor's or administrator's account, to decree payment and distribution of any portion of the estate which may remain to be paid and distributed, and to settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share; to whom the same shall be payable, and the sum to be paid to each person.

The surrogate, upon the settlement of the account of an executor or administrator before him, has jurisdiction to examine and decide upon all claims between such executor or administrator and the estate of the decedent, whether such claims are legal or equitable; so as to make a

(p) "1 Hagg. 535."

(q) Wms. 1782.

(r) S. L. 1850, 587; 2 R. S. (4th ed.) 279-80; *Supra*.

(s) *Glover v. Holley*, 2 Bradf. Surr. Rep. 291.

final settlement and distribution of the estate, according to the rights of the several parties interested therein.^(t)

In *Gardner, Administratrix, with the will annexed, &c. v. Gardner and others*,^(u) where the administratrix had been charged, on the settlement of her accounts before the surrogate, with the sum of \$2,000, received by her from her husband's property in his lifetime, and invested in improvements on, and the purchase of lots for her separate estate; the Chancellor, on appeal, said, "Neither do I see any objection in this case to the jurisdiction of the surrogate to examine and decide upon the validity of a claim against the administratrix in favor of the estate, for the purpose of determining what portion of the estate she shall be permitted to retain as one of the residuary legatees. If a debt claimed to be due cannot thus be ascertained, it will follow, of course, that a bill in Chancery must be filed in every such case; as the administrator or executor cannot sue himself. And yet there are many cases in which the debt claimed to be due from the executor or administrator is beneath the jurisdiction of the Court of Chancery. The object of the Legislature, in the last revision of the laws, was to give to the surrogate a complete jurisdiction to do justice between the parties, upon an executor or administrator's being cited to account. And where such executor or administrator accepts the office, he cannot object to that mode of deciding the question whether he is not himself a debtor to the estate of which he has assumed the management. Whether the sureties of the administrator can be made liable for a balance found due from the administrator to the decedent in his lifetime, is a question which cannot arise in this case. That an executor or administrator cannot be excused from his personal liability for the debt due to the estate, whether the claim against him is a legal or an equitable one, is perfectly clear. And I am satisfied that the Surrogate's Court has jurisdiction to determine the question of such liability, where the alleged debtor is cited to account before that court for the administration of the estate; especially where he is entitled to a distributive share of the fund which may be found due upon such accounting."

In a court of law, one executor or administrator cannot sue his co-executor or administrator, to recover a debt due from the latter to the estate of the testator or intestate. But the Surrogate's Court or a court of equity, upon the application of an executor against his co-executor, can settle the question as to the fact of the indebtedness of the latter to the estate of which he is one of the executors, and the amount of such indebtedness, without divesting the defendant of the possession of the fund due from him to the estate which is represented by both parties to the proceeding or suit; and, when the amount of the defendant's in-

(t) 7 Paige, 591. Where S. bequeathed his personal estate to his son J. W. S., and made L. executor of his will, and the son subsequently died, having previously appointed L. and three other persons his executors; it was held, on an accounting of L. as executor of S., before the surrogate, that the amount which should be found in his hands belonging to the estate of J. W. S., as the legatee of S., his father, would be assets in the hands of L. as one of the executors of the son. But the surrogate, it seems, after the account of L., as executor of the father, had been rendered and settled, would not be authorized to decree payment to his co-executors, under the will of the son, of the balance found due from him, as the executor of the father, to the estate of the son. *Smith v. Lawrence*, 11 Paige, 206.

(u) 7 Paige, 112.

debtedness is ascertained, the court can direct such disposition of the fund due from the defendant as justice and equity may require.^(v)

So, although a surrogate has not jurisdiction to call the personal representatives of a deceased executor to account before him as the representatives of the first testator, when none of the effects of such testator came to their hands in that character, yet, upon the application of a person who, as a legatee or distributee of the first testator, is a creditor of the deceased executor, the surrogate has authority to call the representatives of the latter to account for the estate of their own testator or intestate; and, upon such accounting, the surrogate is authorized to liquidate and determine the amount of the claim against the estate of such testator or intestate, as the representative of the first testator.^(w)

In *Paine v. Matthews*,^(x) where the testator had been a member of a partnership firm, and the partnership had been dissolved previous to his death, at which time he owed the firm a large amount; and the surviving partner since that time had been obliged to pay very large sums to the partnership creditors out of his own private funds, it was stated that the balance due from the decedent to his surviving partner on account of the partnership transactions, after the payment of the partnership debts and the appropriation of all the co-partnership effects to equalize the balances between them, was an unliquidated demand of the fourth class against the decedent at the time of his death; and that the surrogate was competent, upon the settlement and distribution of the estate, to liquidate such demand.

In *Stiles and others v. Burch*,^(y) it was held that the surrogate, upon the accounting of an administrator before him, has jurisdiction to declare the sale of a chattel interest in land, which has been bid in by the administrator for his own benefit, void; and to charge him with the full value of the premises at the time of such sale, with interest, or with the present value and the net income of the property from the time of the sale.

So the surrogate may, upon the accounting of an executor or administrator, determine the validity of an alleged *donatio mortis causa*. In a case where the alleged gift was of certain bonds held by the testator, and where this point was disputed, the learned surrogate of the county of New York made the following observations upon the question:

"The jurisdiction of the surrogate to try this question has been questioned by the counsel of the donee. The surrogate has jurisdiction to try every question necessary to the settlement of the accounts of the executor. It is competent for the legatees, on the accounting of the executor, to produce evidence to charge him with more assets than he acknowledges in his accounts to have received. They may prove the testator had assets which the executor should have collected, or which he has received and not brought into his accounts. In the present case, the legatees assumed the last position. They sought to

^(v) *Smith v. Lawrence*, 11 Paige, 206. See, also, *Wurts v. Jenkins*, 11 Barb. Sup. Ct. Rep. 546.

^(w) *Dakin v. Demming*, 6 Paige, 95.

^(x) 6 Paige, 21.

^(y) 5 Paige, 132.

charge the executor with the amount of these bonds, and showed the bonds had belonged to the testator in his lifetime, and that the executor had admitted they were in the possession of the testator at the time of his death. Had the case stopped there, it would have been my duty to have charged the executor with the amount of the bonds. But he sets up a gift by the testator; and, in order to decide whether he is liable or not for the bonds, the question of gift must be determined. The executor himself raised this point to exonerate himself from liability; and it is necessary to decide it in order to settle his accounts and make a final decree for the distribution of the estate. If an executor can retain assets on the plea of a gift *causa mortis*, and then successfully impeach the surrogate's jurisdiction to inquire into the validity of this plea, the power of this court in respect to the settlement of accounts and the adjustment of estates is at an end.

"I am very clear that this objection is not tenable, and must therefore decree distribution, in accordance with the conclusion to which I have arrived respecting the revocation of the donation by the testator before his decease."^(yy)

This is the proper place to examine the question of the jurisdiction of the surrogate to determine the validity and amount of a claim by a creditor, brought against the executor or administrator, and disputed by him. In connection with the 71st section of the statute at present immediately under consideration, it is necessary, for the purposes of this examination, to refer to the 18th section of the act relative to the rights and liabilities of executors and administrators,^(z) heretofore repeatedly quoted, by which, as will be remembered,^(a) the surrogate having jurisdiction, has power to decree the payment of debts against the executor or administrator of a deceased person.

Upon the application of a creditor, the payment of any debt, or a proportional part thereof, may be so decreed at any time after six months shall have elapsed from the granting of the letters testamentary or of administration.

The earliest case to be noticed, in which the construction of these provisions became a subject of consideration, was that of the estate of John Kent, before the surrogate of the county of New York.^(b) In that case a creditor brought a claim against the estate of the deceased for two thousand dollars and upwards, and presented a petition to the surrogate, praying that the executrix should be required to account and to show cause why she should not pay the debt of the petitioner. The claim was disputed by the executrix, and an account having been rendered, the same was referred to an auditor, who reported that there was due to the petitioner \$1,067 61. The report was confirmed, and the petitioner asked a decree for costs, and in examining this question, as to the costs, the surrogate (the late lamented David B. Ogden) was led to a minute examination of the provisions of the Revised Statutes in relation to his powers, as between the creditors of an estate and the executors. And the surrogate, upon giving judgment, after quoting

(yy) *Merchant v. Merchant*, 2 Bradf. Surr. Rep. 432.

(z) 2 R. S. 116; 4th ed. 300.

(a) See *ante*, p.

(b) *Law of Surrogates*, (1st ed.,) Appendix, p. vii.

the provisions of the statute relative to the presentation of claims against executors and administrators, the reference of disputed claims, and the bringing of suits within six months after the rejection of a claim upon a claim disputed or rejected,^(c) proceeded as follows:

"I cannot find any provision in the statute giving the surrogate any jurisdiction to decide upon a disputed claim against an estate.

"Where the statute speaks of the rights of a creditor to call for an account, and where the statute gives the power to the surrogate to decree the payment of a debt, or any part of it, it must, in my opinion, be intended to apply to undisputed debts.

"In the 71st section, page 35, in relation to the distribution of the estate, it is declared that the surrogate shall, in his decree, settle and determine *all questions concerning any debt, claim, legacy, &c., to whom the same shall be payable, and the sum to be paid to each.*

"The words of this section would appear to require the surrogate to settle, adjust and determine upon the validity of all debts. But the statute must be taken all together, and effect must be given to all its provisions. If there are debts which are doubtful, they are to be referred. If the justice of them is disputed, the creditor must sue for them. Having pointed out these remedies, the Legislature never could have intended, by this 71st section, to give the surrogate a right to decide upon the validity of such claims. What does this 71st section mean, when it declares that the surrogate shall settle and determine *all questions concerning any debt, claim, legacy, &c., to whom the same shall be payable, and the sum to be paid to each?*

"It must be remembered that this section relates to the final settlement and distribution of the estates, prior to which it is to be presumed that all the debts are ascertained. If there be any for which a suit is pending, by the 74th section, the surrogate is to suffer the executor to retain in his hands moneys sufficient to pay all such debts as are in suit, &c.

"It does not give the surrogate power to decide upon the validity of such debts in suit, and it proceeds upon the ground that all disputed debts are in suit; because, by a prior section, the creditor is required to put them in suit within six months after the executor disputes and refuses to allow them.

"When, therefore, the 71st section declares, that the decree of the surrogate shall settle and determine all questions concerning any debt, &c., it does not mean that it is to determine the validity of the debts, but their priority, the amount due upon them, and to whom they belong, whether to the original creditor, or to his assignee, or to his executor, &c.

"That this is the true construction of the statute is, I think, evident from the provisions of the statute in relation to the sale of lands for the payment of debts.

"By the 14th section, 2d vol. R. S. 41, it is declared, that the surrogate shall make no orders for the sale, &c., of real estate, until upon due examination he shall be satisfied, among other things, that the

(c) 2 R. S. 29; 4th ed. *ante*, p. 356.

debts, for the purpose of satisfying which the application is made, are justly due and owing.

"And by the 10th section, page 40, it is provided, that any person interested in the estate, 'may contest the *validity* and *legality* of any debts, demands, or claims, which may be represented as existing against the estate, and by the 11th section, page 41, if, upon the hearing, any question of fact shall arise, which, in the opinion of the surrogate, requires a trial by jury, he may direct an issue,' &c.

"By these provisions it will be perceived that express power is given to a surrogate to try the *validity* of the claims.

"No such power is given in ordinary cases, and it is presumed that if the Legislature had intended to vest the surrogate with such power, they would have given it in express terms, as they have in the act in relation to sales of real estate.

"From what I have said, it will be seen that, in my opinion, I ought not to have exercised any jurisdiction in the case of this debt, it having been disputed, and for this reason can allow no costs."

In the *Matter of the accounting of Jones, Executor, &c., of John Mason, deceased*,^(d) before the surrogate of the same county, the late Hon. Charles McVean also concluded that the surrogate has not the jurisdiction to try or establish a disputed debt, under any circumstances, and that such jurisdiction is exclusively in the common law courts.

In *Magee v. Vedder*,^(e) this question came distinctly before the Supreme Court, at general term in the third district, upon an appeal from a decree of a surrogate, directing the payment of a debt where the administrator had objected that the claim was disputed and that the surrogate had not jurisdiction, and the court determined that the surrogate has not power to decide upon the validity and amount of a claim against an estate, upon the petition of a creditor praying for a decree directing its payment, when such claim is disputed by the executor, and the right of the surrogate to make such a determination is denied.

In *Wilson v. The Baptist Education Society of New York*,^(f) Mr. Justice Brown, at general term in the second district, after an elaborate discussion of the subject, declared his opinion, that a surrogate has not jurisdiction or authority, upon the final accounting of an executor, to make a decree for the payment of the money mentioned in an instrument executed by the testator, where the same is disputed, and the liability of the executor to pay the amount denied; and no judgment has been obtained for its recovery.

In *Fitzpatrick v. Brody and others, Executors, &c.*,^(g) however, a different view of the question of jurisdiction is supposed to be taken. In that case the plaintiff brought an action upon a promissory note made by the testator to the plaintiff, and the defendants pleaded that the plaintiff had duly applied to the surrogate for a decree for payment of the claim; that the defendants duly appeared before the surrogate and denied the claim and demand thus sought to be enforced against the estate, whereupon the surrogate proceeded to hear the proofs and allega-

(d) 5 N. Y. Legal Observer, 124.

(e) 6 Barb. Sup. Ct. Rep. 352.

(f) 10 Barb. Sup. Ct. Rep. 308.

(g) 6 Hill, 581.

tions of the parties; and that the surrogate, after due deliberation thereupon, adjudged and decreed that there was no debt due or owing from the estate, or from the defendants, as executors, to the plaintiff, as by the records, &c. The question arose, upon a demurrer to this plea, and the court, after adverting to the provisions of the statutes prescribing and regulating the duties and obligations of executors and administrators, and relating to the payment of debts, &c., and the making of distribution by executors and administrators,^(h) and after remarking that they cannot be compelled to render their accounts, nor can they voluntarily render them before the surrogate, agreeably to these provisions, until after the expiration of the eighteen months from the issuing of the letters testamentary or of administration,⁽ⁱ⁾ proceed as follows:

"But power is conferred upon the surrogate to inquire into the condition of the assets short of this period, at the instance of a creditor. And if they are found sufficient and available, the surrogate may direct the payment of the debt, or a proportional part of it, as the state of the assets at the time shall seem to warrant. This was the object of the provision mainly relied on to sustain the plea in question.

"True, the validity of the demand thus presented, must be incidentally involved, as the surrogate is to be first satisfied that it is an existing debt against the estate, before directing the appropriation of the assets in payment of it; and he may doubtless deny the application on the ground that the demand is not sufficiently established, leaving the creditor to his legal remedy by suit, or by reference under the statute. Such denial, however, will not be conclusive upon the creditor; its only effect being to deprive him of the possibility of anticipating payment before the expiration of the eighteen months, or before he has established his debt in due course of law."

Upon this decision, Mr. Justice Harris, in *Magee v. Vedder*,^(j) comments as follows: "The court do not seem to have had in view the distinction between the jurisdiction of the surrogate in respect to disputed and undisputed debts. Yet, I apprehend it is the only ground upon which the decision is sustainable. If the surrogate had jurisdiction to try the validity of the demand, and did try it, and decided that it was not a valid debt against the estate, upon what principle could another court entertain jurisdiction of the same question? The decision, in my judgment, can only be defended upon the ground that the surrogate had no power to decide upon the validity of a contested claim, and if he undertook to make such a decision, he transcended his jurisdiction, and his decision was, therefore, not binding upon the parties.

"After having so studiously provided for the speedy settlement of estates, without unnecessary expense, it never could have been intended by the Legislature to allow the creditor the chances of a double litigation. If the surrogate, as well as the common law courts, has jurisdiction to try all contested demands, I see nothing to prevent an adventurous claimant from trying his fortune before both tribunals. The case of *Fitzpatrick v. Brady*, decides that a decision against the

(h) 2 R. S. 27; 2d ed. Id. 32.

(i) Id. 32, sec. 52; Id. 35, sec. 70.

(j) *Supra*.

claim by the surrogate, is not a bar to an action at law. What then is to prevent the claimant from first proceeding before the surrogate, and that too without even exhibiting his claim, before he institutes his proceedings under the 18th section of the 5th title? If he succeeds there, the decision of the surrogate must be conclusive upon the executor or administrator, unless by possibility he, by an appeal, transfers the litigation to a court of equity. And on the other hand, if he fails, the decision of the surrogate is not to prevent his renewing the litigation in a court of law. No such inconsistency was ever contemplated by the Legislature. No principle of construction requires that such an effect should be given to any provision of the statute."

In *Kidd v. Chapman*,^(k) which was an appeal from a decree of the surrogate of the county of Rensselaer, the respondents, Chapman & Daniels, in January, 1838, recovered a judgment against A. Kidd, which was docketed on the 25th of the same month. Kidd died a few days afterwards, possessed of a large personal estate, and the appellants, M. & J. Kidd, proved his will and took out letters testamentary thereon, as his executrix and executor. The judgment was for about \$156; and the inventory of the personal estate of the decedent exceeded \$20,000. Soon after, letters testamentary were granted to the appellants, and more than six months before the presenting of the petition of the respondents to the surrogate, the attorney of Chapman & Daniels called upon J. Kidd, the executor, with the judgment, and requested payment thereof to his clients. The executor promised to call upon his legal advisers the same afternoon, and to let the respondent's attorney know if it would be paid; but he never gave him or his client any information upon the subject. In November, 1839, more than eighteen months after granting letters testamentary to the appellants, a petition was presented to the surrogate, stating these facts, and also that the judgment still remained due and unpaid, and praying that the executrix and executor might be called to render an account of their administration of the estate of the decedent, and might be decreed to pay the amount due upon the judgment.

"Upon the return of the citation, the executrix and executor appeared by their counsel, and disputed the debt and refused to pay the same; and they then insisted that the surrogate had not jurisdiction to compel them to pay such disputed debt until the same had been referred, or prosecuted to judgment against the executor and executrix. But they neither admitted nor denied the allegation in the petition, that the personal estate of the testator was more than sufficient to pay all his debts. The respondents thereupon proved their debt by the production of the record of judgment, and they proved the amount of the testator's personal estate by the production of the inventory filed by the executrix and executor. They also proved the presenting of the judgment to the executor, and a request of payment, and his promise to see his counsel and to communicate the result of the interview, as above stated. The counsel for the executrix and executor, thereupon insisted that the facts proved, amounted to a rejection of the claim; and that as it had not been prosecuted within six months there-

(k) 2 Barb. Ch. Rep. 414.

after, the claim was barred by lapse of time. The surrogate, however, overruled the objections, and made a decree for the payment of the amount of the judgment, and interest thereon as damages, with the costs of the proceedings. From this decree, the executrix and executor appealed to the Chancellor." And the Chancellor stated his view of the law upon the question at present under consideration, as applicable to the facts of that case, as follows :

"The only question is, whether the surrogate had jurisdiction to decree the payment of this debt without subjecting the judgment creditors to the useless expense of bringing another suit at law, against the executrix and executor upon the judgment, and recovering a new judgment thereon against them. The only objection that can reasonably be made to the exercise of such a power by the surrogate, is, that it might, in some cases, deprive the personal representatives of the decedent of the right to have the debt claimed, established by the verdict of a jury before it is decreed to be paid. That, however, is a matter resting altogether in the discretion of the Legislature, especially where the executor or administrator, upon the presentment of the claim to him, does not think proper to deny its justice or legal validity, so as to make it the duty of the claimant to bring a suit at law to establish his claim at the expense of such executor or administrator, or of the estate of the testator or intestate. It is not only in the power of the Legislature to establish a summary remedy for the settlement of the estate of deceased persons, but it has unquestionably authorized the surrogate to examine and decide as to the validity of all claims against the personal estate of the decedent, upon an application for the final settlement of the accounts of an executor or administrator. The 71st section of the article of the Revised Statutes, relative to the duties of executors and administrators in rendering an account, and in making distribution to the next of kin, declares that upon the final settlement of the account, if it shall appear that any part of the estate remains to be paid or distributed, the surrogate may make a decree for the payment and distribution thereof among the *creditors*, legatees, widow and next of kin, according to their respective rights; and in such decree *shall* settle and determine all questions concerning any *debt*, claim, legacy, bequest or distributive share; to whom the same shall be payable, and the sum to be paid to each person.^(l) The only exception to this imperative direction to the surrogate, to determine all questions as to debts or claims against the estate of the decedent, upon a final settlement of the accounts of the personal representatives, appears to be in the 74th section of the same article. That section provides, that if it appears to the surrogate that any claim exists against the estate, which is not then due, or upon which a suit is then pending, he shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained for the purpose of satisfying such claim when due or when recovered; or of being distributed according to law.^(m) The provision of the Revised Statutes, authorizing the surrogate to decree the payment of a debt, where the executors or administrators do

(l) 2 R. S. 95.

(m) Ib. 96.

not think proper to ask for a final settlement of their accounts, are not imperative; and, therefore, where the claim of the creditor is intended to be contested in good faith, and where the same has in fact been rejected or disputed by the executors or administrators, at the time it was presented to them for payment, and the claimant has neglected to proceed at law to establish the validity of his claim, the surrogate, in the exercise of a sound discretion, may perhaps refuse to permit the claim to be litigated before him in the first instance, upon the direct application of the claimant for the payment of his debt. But the 18th section of the title of the Revised Statutes, relative to the rights and liabilities of executors and administrators,⁽ⁿ⁾ expressly declares that the surrogate shall have power to decree the payment of *debts*, legacies and distributive-shares, upon the application of a creditor at any time after six months, and upon the application of a legatee or distributee at any time after one year, from the time of granting of the letters testamentary or of administration. And in the case under consideration, I think the surrogate had power to decree payment of the respondent's judgment: although the executor and executrix did not ask for a final settlement of their accounts.

It is true that although the judgment recovered against the testator in his lifetime, was conclusive evidence of his indebtedness at the time of the recovery of such judgment, so long as it remained unreversed, it is only *prima facie* evidence of indebtedness against his personal representatives, as it might have been paid by the testator in his lifetime. And even if the judgment had been recovered against such representatives, they might still dispute the existence of the debt before the surrogate, by contending that it had been subsequently paid. But in neither case would it be a proper exercise of discretion on the part of the surrogate, to refuse to proceed further upon the petition of the judgment creditor for the payment of such a debt, where the creditor in the petition had sworn that the debt was still due, merely because the counsel of the personal representatives of the decedent thought proper to say his clients disputed the debt. Even if it was proper to receive an oral answer by counsel to a sworn petition, which stated the recovery of the judgment, and that it was still due, and that the personal estate was more than sufficient to pay all the debts of the decedent, it was no answer to such a petition to say that the debt was disputed. But the answer should either have denied the recovery of the judgment, or should have stated that it had been reversed, or had been paid, either wholly or in part, by the testator in his lifetime, or by his personal representatives after his death; and if paid in part, stating the amount of such payment. And if the executrix and executor expected to satisfy the surrogate that it was a proper case for him to suspend the proceedings until the petitioner had established the debt against them in an action at law, they should have verified their answer by oath, at least as to their belief.

"Under the circumstances of this case, I have no doubt that it was the duty of the surrogate to proceed upon this petition, and to decree the payment of the judgment therein mentioned with interest and

(n) 2 R. S. 116.

costs out of the estate of the testator in the hands of the appellants, without subjecting the petitioners to the delay and expense of an action at law upon the judgment. The production of the record of such judgment was *prima facie* evidence of the debt claimed. And the inventory of personal estate, amounting to more than \$20,000, was *prima facie* evidence that the funds in the hands of the personal representatives of the testator were sufficient to pay the amount proved to be due to the petitioners, in the absence of proof that any older judgments existed against the testator at the time of his death, or that the fund in the hands of his executor and executrix was insufficient."

In *Magee v. Vedder*,^(o) Mr. Justice Harris thus speaks of this judgment: "It is not easy to see, from the Chancellor's opinion in the case, the precise ground upon which his decision is founded. The surrogate decided that the claim had not been rejected. The Chancellor sustained his decision. Whether or not the surrogate regarded what occurred, when the attorney applied to the executor for payment, as an admission of the demand, and, therefore, held that he had authority to proceed to make a decree for its payment as an undisputed debt; or whether, having merely decided that the debt had not been rejected by the surrogate, he had the power to proceed to try its validity, does not distinctly appear from the report of the case. Nor does it appear whether the Chancellor regarded it as an established debt or not. It is to be inferred, however, from the Chancellor's language, that he regarded the surrogate as possessing the power to determine upon the validity of a claim, upon the application of a creditor for a decree directing the payment of his debt, for he says, it is in the discretion of the surrogate to determine whether he will, in the first instance, permit the claim to be litigated before him;' thus implying that, in the opinion of the Chancellor, the surrogate would have jurisdiction of the matter if he should choose to entertain the litigation. In respect to the case before him, all he says, is that *he thinks the surrogate had power to decree payment of the respondent's judgment*, although the executor did not ask for a final settlement of his accounts, and, under the circumstances of the case, it was the duty of the surrogate to make the decree. In the decision of the surrogate and the Chancellor upon the facts before them, I entirely concur. The facts proved amounted to an admission of the claim, sufficient to justify the surrogate in proceeding to make a decree for its payment as an undisputed debt. The claim, in the opinion of the Chancellor, was not in fact controverted by the executor before the surrogate, and I think he was not at liberty to controvert it. Whatever may have been the views of the Chancellor, in respect to the question now under consideration, he does not seem to have considered that question as necessarily involved in the decision of the case before him. I do not, therefore, regard the case as a judicial determination of the question, I do not think the Chancellor himself so understood it. The case was properly decided, whatever construction may be given to the provisions of the statute in relation to the surrogate's jurisdiction to determine upon the validity of contested claims."

Mr. Justice Brown also, in his opinion in *Wilson v. Baptist Education*

(o) 6 Barb. Sup. Ct. Rep. 352, 353; *supra*.

Society, (p) after referring to the 36th and 37th section of the statute (q) providing for the presentation and reference of claims against the estates of deceased persons, and to the 38th section (r) limiting the time for bringing actions upon disputed claims; and after stating that the application made to the surrogate by a creditor, legatee, or one of the next of kin, under the above 52d section of the statute, that the executor or administrator render an account of his proceedings; or by the executor or administrator himself under the above 60th section, to have his account finally settled; or, under the above 70th section, to render a final account; is not the commencement of a suit in the sense in which the term is used in the 38th section, and that it is evident that the validity of a claim against the estate, and which has been disputed or rejected, and whether the claimant is entitled to be classed amongst the creditors, is not one of those questions which the surrogate may determine by virtue of the above 71st section, declaring that whenever an account shall be rendered and finally settled under any of the sections referred to, the surrogate shall make a decree for the payment and distribution of the estate among the creditors, legatees, widow and next of kin, "and in such decree shall settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share, to whom the same shall be paid, and the sum to be paid to each person;" because the power therein given is not to be exercised by, and does not vest in, the surrogate, until the accounts of the executor or administrator have been rendered and finally settled, and the amount to be paid and distributed ascertained; that the 18th section, above quoted, employs language of similar import, and confers upon that officer authority, "upon the application of any creditor," to decree "the payment of any debt, or a proportional part thereof;" after six months from the time of granting letters, &c., and that the word "creditors" means persons having claims that are recognized and admitted, or such as have been ascertained and established by the judgment of a competent court, and not those that have been disputed or rejected, proceeds to make the following remarks upon this judgment of the Chancellor: "In the case of *Kidd v. Chapman*, the claim was upon a judgment against the testator. The creditors applied to the surrogate by petition, and prayed for an account of the administration of the estate, and for a decree for payment of the amount due upon the judgment. Upon the return of the citation, the executor and executrix disputed the debt and refused to pay, and insisted that the surrogate had no power to enforce payment until the debt had been established by a judgment against them. The case came before the Chancellor upon an appeal, and after referring to the 18th section of title 5th, he says, 'I think the surrogate had power to decree the payment of the respondent's judgment, although the executor and executrix did not ask for a final settlement of their accounts.' Upon reading his opinion it will be seen, however, that those provisions of the statutes which influence, if not entirely govern, the determination of the question, were not brought to his notice; and I entertain no doubt that, had they engaged

(p) 10 Barb. Sup. Ct. Rep. 308, 318-19; *supra*.

(q) 2 R. S. 88; 4th ed. 274; *ante*, pp. 323, 347 *et seq.*

(r) 2 R. S. 88; 4th ed. 274; *ante*, pp. 324, 355-6.

his attention with those to which he did refer, he would have been brought to an opposite conclusion."

In *Campbell v. Bruen*,^(s) the petitioner claimed to be a creditor of the deceased, and prayed for an account and payment of his demand. The executor, in his answer, denied any knowledge of the claim; and, insisting upon full proof thereof in a court of competent jurisdiction, excepted to the jurisdiction of the surrogate. He also set up, in bar, the Statute of Limitations and presumption of payment. Mr. Surrogate Bradford, in a learned and elaborate judgment, in which he entered into a full examination of the statutes and authorities bearing upon the question, determined that he had jurisdiction to adjudge the validity and amount of the claim. After referring to the above cited 55th, 57th, 58th, 52d and 60th sections of the statute, and also to the 68th and 69th sections of the statute,^(t) providing for the accounting and settlement of the account of a superseded executor or administrator; and after showing that there are two cases in which the account may be settled; one on the motion of an adverse party, and the other on the application of the executor or administrator; and after observing that all the previous sections contemplate "the case of a settlement at the instance of a creditor" or other party in interest, and that the 70th section, authorizing an executor or administrator to render a final account of all his proceedings, "although not cited to do so," on a citation to all persons interested, declares that thereupon the same proceedings shall be had for a final settlement, and with a like effect in all respects as in the case of a settlement at the instance of a creditor, the learned surrogate proceeds as follows:

"Thus far the statute seems to me clear, consistent and harmonious. It remained for the Legislature to point out the powers of the surrogate, and the mode of their exercise in respect to the payment of debts, legacies and distributive shares in each of the two cases in regard to which they had given the surrogate authority to settle the accounts of the estate. Upon a final accounting, it is declared in section 75, that the surrogate "shall make a decree for the payment and distribution" of the estate "to and among the creditors, legatees, widow and next of kin to the deceased, according to their respective rights; and in such decree shall settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share, to whom the same shall be payable, and the sum to be paid to each person;" and the only exception to this imperative direction is in the 78th section, which provides that, if any claim exists which is not then due, or upon which a suit is then pending, the surrogate shall allow a sufficient sum to be retained to meet such claim, or its proportionate part of the estate. Thus far the statute pursues the practice of the ecclesiastical courts,^(u) in its prominent features, pointing out the course of procedure in particular detail, and giving to the surrogate no larger jurisdiction than was possessed by the spiritual courts, except in respect to the claims of creditors. It never was any part of ecclesiastical jurisdiction to award the

(s) 1 Bradf. Surr. Rep. 224.

(t) 2 R. S. (4th ed.)

(u) 1 Phillimore, 241; 2 Add. 236; 1 Lee's Cases, 569; 2 Ibid, 251; 4 Burns' Ecc. L. 487; Toller, 494; 2 Jac. & Wal. 201; 2 Lee's Cases, 1; 2 Add. 330.

payment of a debt; and, therefore, a creditor could never contest an account rendered on oath, or demand its settlement, though a legatee could. Our statute, in the sections to which I have adverted, steps beyond this limit, and authorizes the settlement of an account at the instance of a creditor; and, upon a *final* settlement, makes it imperative upon the surrogate to adjudicate upon all claims, and decree payment accordingly. This was a large increase of power, drawing, as it does, within the jurisdiction of this court, on the application of the executor or administrator, the hearing and settlement of every possible claim on the personal estate, in law or equity, upon which a suit is not pending at the time. This power may be invoked by the executor or administrator at his will, and was designed, as appears from the notes of the revisers, to afford a substitute for a court of equity, wherein alone at that period a final settlement of accounts could be procured.

"As yet, however, no authority was conferred upon the surrogate to decree the payment of a debt on the application of the creditor. The law, as then existing,^(v) provided for an account only in such case. But having directed the surrogate to decide upon all debts and decree payment, on a final accounting, whenever demanded by the executor or administrator, it was quite consistent in principle to give him the like jurisdiction on the demand of the creditor; and the revisers consequently reported provisions to meet that end. They state that in the effort to reduce the law relating to the estates of deceased persons into some order,^(w) their chief object had been to effect a settlement of the estates of deceased persons, and to cause a distribution to be made as speedily as possible;^(x) and that one of the provisions inserted for that purpose was "to compel an account by the administrator, &c., at the instance of *creditors* and relatives;" and another, "to make it the interest of creditors to present their demands and have them ascertained without suit." One of the most important features in the development of this plan, relates to the jurisdiction of the surrogate in regard to the payment of debts. As I have just observed, it was put in the power of the executor or administrator to bring the creditor before the surrogate in the settlement of the accounts of the estate; and so, likewise, provision was made for enabling the creditor to bring the executor or administrator before the same court, in the following words:^(y) "The surrogate having jurisdiction shall have power to decree the payment of debts, legacies and distributive shares against the executor or administrator of a deceased person in the following cases: 1. Upon the application of a creditor, the payment of any debt, or a proportionate part thereof, may be so decreed at any time after six months shall have elapsed from the granting of the letters testamentary or of administration; 2. Upon the application of a legatee or relative entitled to a distributive share, payment of such legacy or distributive share, or its just proportional part, may be so decreed at any time after one year shall have elapsed from the granting of such letters." The next section authorizes the surrogate to prosecute the official bond of the ex-

(v) 1 R. S. 311, 448.

(w) 3 R. S. (2d ed.) p. 625.

(x) Ibid, p. 626.

(y) 2 R. S. (3d ed.) p. 178, sec. 19.

ecutor or administrator whenever he shall refuse or omit to perform any decree "for rendering an account, or upon a final settlement, or for the payment of a debt, legacy or distributive share." The revisers, in their note to section 19, say: "The mode in which the surrogate is to proceed in making and enforcing his decrees, &c., will be fully treated of in a title of the office and duties of surrogates. All that is deemed proper here is to declare the rights of creditors and legatees to proceed before him." And in their note to section 20, they say: "This provision seems necessary to the perfection and harmony of the system." In the subsequent title of "Surrogate's Courts," it is declared that they shall have power "to direct and control the conduct and settle the accounts of executors and administrators," and "to enforce the payment of debts and legacies, and the distribution of the estates of intestates;" and authority is given to enforce all lawful orders, process and decrees, by attachment. How jurisdiction over all claims, debts and demands, could have been given in more comprehensive phrases, than by the various sections of the statute quoted, I cannot well perceive. The arguments against it, as an authority subversive of the right of trial by jury, are only plausible. It is somewhat remarkable, in regard to this objection, that the revisers reported a section providing for an award of issues for the trial of disputed questions of fact,^(z) which was not enacted. Such issues were authorized in respect to questions of fact arising upon applications to sell real estate;^(a) but even in that case it was left entirely to the discretion of the surrogate whether to award them. The late Chancellor adverted to this question of a jury trial, in *Kidd v. Chapman*,^(b) and justly observes, that the matter is one "resting altogether in the discretion of the Legislature;" and it is manifest that, in conferring power upon the surrogate to order the payment of debts, the Legislature did not consider it necessary to provide for a jury trial. The case is not precisely analogous to the ordinary one of debtor and creditor. The moment a debtor dies, the law asserts the rights of the creditors and takes the property into its hands. The executors or administrators derive their authority from the law, and, as officers of the law, in laying down the mode in which their duty is to be performed, it is perfectly competent for the Legislature to establish a summary mode of proceeding in the settlement of the estate and the payment of the debts. Besides, it ought not to be forgotten that, previous to the adoption of these statutory provisions, as now, it was in the power of the creditor or claimant to procure the satisfaction of his demand out of the personal or real estate in equity.^(c) In giving jurisdiction to the same extent to the surrogate, no substantial change was made,—the right of an appeal to the Court of Chancery being retained, and the mode of *commencing* the proceedings^(d) only, being altered. In view of the many important and radical modifications of the existing law affecting estates of deceased persons, enacted in the Revised Statutes, the provisions in relation to

(z) Orig. sec. 10; 2 R. S. (2d ed.) 156; 3 R. S. 680.

(a) 2 R. S. (3d ed.) p. 165, sec. 14.

(b) 2 Bar. Ch. R. 423.

(c) 1 Madd. Ch. 572, 582; Story's Eq. secs. 535, 537, 546.

(d) 3 R. S. (2d. ed.) 644.

costs against executors; to the adjudication of every kind of claim,(e) legal or equitable, by the surrogate on a final accounting; to compelling the sale of the real estate in satisfaction of the debts, and the right therein to pass upon all claims; I cannot but think it within the spirit and intention, as well as the letter of the statute, to give the surrogate jurisdiction to decree the payment of a debt or claim, although disputed by the executor or administrator. Were the question a new one, I should, therefore, after the examination I have given it, be compelled to sustain the jurisdiction. The Supreme Court, however, seem to have recognized it as well grounded;(f) and the Chancellor has expressly passed upon the point in the case already cited. These decisions expressly, or by implication, sustain the idea that it rests in the discretion of the surrogate, whether or not, in any particular case, he will exercise the jurisdiction. My practice in this respect has been to hear the case in the first instance, and, unless some question of fact was raised, making it proper to suspend the proceedings until the claim was established at law, to pass upon the validity of the claim, and order or refuse payment accordingly. There is no such issue involved in the present case, and I shall therefore proceed to consider the nature and validity of the claim demanded."

The surrogate then proceeded to overrule the defence of the Statute of Limitations and presumption of payment set up by the executors, and decreed the payment of the petitioner's claim.

In the case of *Flagg v. Ruden*,(g) which had arisen previously, the surrogate had refused to make a decree for the payment of a claim against the executrix where the defence was, payment to be presumed from the lapse of time and other circumstances. After a full consideration of the law and facts of the case, and after arriving at the conclusion, upon the merits, that the claim of the petitioner could not be sustained, the learned surrogate declares as follows:

"The law giving me jurisdiction(h) is not imperative;(i) and where the claim of a creditor, presented under this section of the statute, has been rejected by the surrogate after a full trial, it is no bar to a suit at law.(j) An action may be brought on the bonds, under as favorable circumstances for a recovery as if this application had never been made to me. If I were compelled to decide the case upon the merits, I should dismiss the petition. I prefer, however, to place the denial of the application, on the ground that it does not seem to me a proper case for the exercise of the discretionary power given me by the section of the statute under which the petition is filed."(k)

(e) *Payne v. Matthews*, 6 Paige, 22; *Gardner v. Gardner*, 7 Paige, 115.

(f) *Fitzpatrick v. Brady*, 6 Hill, 581.

(g) 1 Bradf. Surr. Rep. 192.

(h) 2 R. S. (3d ed.) p. 178, sec. 19.

(i) *Kidd v. Chapman*, 2 Barb. Ch. R. 414.

(j) *Fitzpatrick v. Brady*, 6 Hill, 581.

(k) If the learned surrogate had seen fit to decide the case upon the merits against the petitioner, the result would have been the same. He would have left the petitioner exactly where he leaves him by this decision. According to the supposed doctrine of *Fitzpatrick v. Brady*, the judgment would not have had any effect to bar or defeat another suit for the same cause of action.

In *Waydell v. Velie*,^(m) the question was whether a balance of \$181, due, on a judgment held by the petitioner's intestate against the administrator, defendant's intestate, had been paid. The surrogate found, under the circumstances, that the administrator had established a *prima facie* case of payment. "I think," said he, "a jury would have arrived at the same conclusion upon the facts; and I cannot, therefore, in the exercise of the discretion vested in me, order the payment of the petitioner's demands. The petition must therefore be dismissed, without costs, however, to either party."⁽ⁿ⁾

In *Hall v. Bruen*,^(o) where the petitioner, claiming to have an unsatisfied demand against the testator, obtained an order requiring the executor to show cause why his alleged debt should not be paid, the learned surrogate expressed his confidence in the correctness of his previous judgments, that "the surrogate possessed authority to pass upon a disputed claim, as well on a final accounting as in a summary proceeding of this kind." "Experience," he said, "shows, I think, that the possession of this power is convenient and useful for the prompt and economical adjustment of debts and the early liquidation of an estate, while the want of it would lead to more expensive and protracted litigation elsewhere. I have seen no evils consequent upon its exercise." And after adverting to a decision of the Supreme Court at general term in Albany, (doubtless in *Magee v. Vedder*), without, however, regarding it as entitled to any particular examination; and again declaring his concurrence with the views of the Chancellor in the case of *Kidd v. Chapman*; and, after reciting some of the circumstances of the case before him, he concluded his opinion as follows: "The claim is very large in amount, and is grounded upon a complex and intricate state of facts. The questions of law raised are of the nicest character, the facts are complicated, and the whole case is of a purely equitable nature. Without looking at its merits, I have examined it so far as to be able to say that, in my judgment, it is not a suit which ought to be litigated here; and, in the exercise of the discretion given by the statute, my opinion is the order should be discharged, leaving it to the petitioner to establish the rights he claims in another and more appropriate tribunal."^(p)

In *Jennings v. Phelps*,^(q) where, upon an application for an order directing the administrator to pay a demand against the estate, it appeared that the claim was founded upon a judgment more than twenty-three years old, and an alleged recognition of the judgment by the intestate after the lapse of twenty years, and the demand was contested by the administrator: it was held, that under the circumstances, the

(m) 1 Bradf. Surr. Rep. 277.

(n) In this case the question was one of fact. The petitioner had the benefit of one litigation before the surrogate, and his solemn judgment upon the question. The decision having been against him, did not preclude him from again litigating the same question in another suit.

(o) 1 Bradf. Surr. Rep. 485.

(p) According to this decision, the jurisdiction of the surrogate depends upon whether the claim is large or small; whether the state of facts is simple and clear, or complex and intricate, the questions of law easy or of a nice character; whether the case is of a legal or an equitable nature, and other considerations of this description.

(q) 1 Bradf. Surr. Rep. 435.

surrogate, in the exercise of a reasonable discretion, should refuse to hear the case, and leave the claimant to his remedy by action at law.

In *Woodruff v. Cox*,^(r) the application was on the part of an alleged creditor for the payment of a debt. The petitioner was the assignee of the claim, and the surrogate dismissed the application on the ground that, on a trial before him, the petitioner escaped the application of the rule of evidence provided by the 399th section of the Code prohibiting the examination of the assignor of a thing in action, in a suit by the assignee against an executor or administrator, unless the other party to the contract is living. "A rule of evidence," says the surrogate, "designed to meet a class of cases precisely like this—a rule which is the general law in all the usual channels of justice—which is most wise and salutary in its nature, and is especially applicable to proceedings against the estates of deceased persons."^(s)

These decisions^(t) sufficiently indicate the conflicting views which have been taken of the provisions of the statute under consideration. The jurisdiction claimed and exercised by the learned surrogate of the county of New York should, perhaps, be termed an optional, rather than a discretionary one. If he has the authority to determine upon the validity and amount of a disputed claim, it is not the exercise of a legal discretion to decline to take cognizance of and adjudicate upon an alleged claim, because it is large in amount, difficult or complicated, or equitable in its nature, or because of the rules of evidence which are applicable to the case. A jurisdiction which allows such circumstances to operate upon and prevent its exercise is certainly an anomaly, and one not to be conceded unless upon a complete demonstration that the language of the statute conferring it admits not of any other interpretation. On the other hand, it is not to be supposed that the jurisdiction conferred upon the surrogate by the provisions of the statute under examination, is to be defeated by a mere allegation on the part of the executor or administrator that the claim which he is called upon to answer is disputed. The doctrine of the Chancellor in *Kidd v. Chapman*, as understood by Mr. Justice Harris, in *Magee v. Vedder*, is probably a just exposition of these provisions, and affords a correct view of the jurisdiction of the surrogate in the premises. When an executor or administrator is ordered, under the 18th section of the statute,^(u) to show cause before the surrogate why he should not pay a debt of the decedent, or when, on a final accounting by an executor or administrator, it appears that there is a debt remaining unpaid, it will not be sufficient, to prevent the surrogate from decreeing the payment of such debt, for the executor or administrator merely to allege that he disputes such debt. If it appear that the claim has been established by the judgment or decree of a competent court, and the administrator does not allege payment, the claimant, notwithstanding the alleged dis-

(r) 2 Bradf. Surr. Rep. 223.

(s) This most inestimable rule, however, in the learned surrogate's view of the question of jurisdiction, it was entirely competent for him to have disregarded. From no legal obligation or constraint, but solely upon his individual notions of justice and right, he declined to take cognizance of the case, and dismissed the application.

(t) For other cases, see *Eitel v. Walter*, 2 Bradf. Surr. Rep. 287; *Bowen v. Bowen*, *Ib.* 336.

(u) 2 R. S. 116; 4th ed. 300.

pute, is entitled to an order for payment. If the claim has not been established, but is sworn to on the part of the creditor, the executor or administrator must show that in good faith there exists some question, either of law or fact, affecting the validity or amount of the claim. Upon this being shown, the jurisdiction of the surrogate probably ceases. It is not within the scope of his authority to determine as to the sufficiency of the grounds upon which such question is taken, or to do anything further in the case than to decide whether it is raised by the executor or administrator in good faith. Such, it is submitted, in view of the provisions of the statute, and the cases which have been quoted, is the condition of the surrogate's jurisdiction in respect to claims against the estates of deceased persons.

It is plain, at any rate, that with the exception, perhaps, of determining the validity and amount of a disputed debt due from the decedent to a creditor, all other questions relating to claims are within the jurisdiction of the surrogate. The share to be appropriated to every admitted or established claim is to be decided. Creditors whose claims have been admitted, or who have recovered judgments against the executor or administrator, are, if there be sufficient assets, to be decreed payment in full, or if there be a deficiency, are to be decreed payment in the order and proportion prescribed by the statute regulating the payment of the debts.^(v) If the executor or administrator has been ordered to account on the application of a person who has recovered a judgment against him otherwise than after a trial at law upon the merits, the amount applicable to such judgment, and for which an execution shall issue, may be designated. It has been seen^(w) that if the creditor has obtained his judgment after a trial at law upon the merits, he is entitled to an account, and to an order that an execution issue immediately or at any time afterwards; but he also may take his remedy by the present proceedings. The validity of the legacies and the title of a person claiming as a legatee, widow or next of kin, are to be determined by the decree. If there be a surplus after the payment of the debts, but a deficiency to discharge or pay all the specific and general legacies, the proper abatement is to be made, and the proportion to which each legatee may be entitled is to be declared. In case there are assets remaining after the payment of the debts and the discharge or payment of the legacies above spoken of, then the shares of the residuary legatees are to be allotted. If the residuary estate, or any part thereof, be undisposed of by the will, then the same is to be distributed according to the above section, numbered 75, to the widow, children and next of kin. In cases of intestacy, the surplus, after the payment of the debts, is to be distributed according to the same 75th section.

From this it will be perceived, as was premised at the commencement of this chapter, that claims of every description against the assets in the hands of an executor or administrator may be enforced on an accounting before the surrogate. It will be found that the remedy afforded to creditors, legatees, particularly general and residuary legatees, and the widow, children, or next of kin, by proceedings under

(v) 2 R. S. 87. See *ante*, pp. 284.

(w) See *ante*, p. 321, 336.

those sections which have now been treated of, is more effectual and certain, and subject to fewer hindrances and qualifications, than that provided by any other portion of the statutes respecting the government of executors and administrators.

Where a surrogate decrees a distribution of the personal estate of the deceased debtor among his creditors, if any of such creditors has a security for his debt upon another fund which is primarily liable for the payment of the debt, the surrogate should compel such creditor to exhaust his remedy against such fund, and only to come in as against the personal estate for the deficiency. And where it is necessary for the surrogate to make a distribution of the personal estate of the decedent before such deficiency can be ascertained, he should direct a portion of the personal estate to be retained to meet the contingent claim for such deficiency.^(x)

In *Rogers v. Rogers*,^(y) Chancellor Walworth says: "Where there is a specific lien on the land devised, as in the case of a mortgage, or where the land is devised on condition of the payment of debts, or the debts are directed to be paid out of the estate devised; and where it appears, from the will, that it was obviously the intention of the testator that the legacy should be received entire, and the debts paid out of other funds, the court will marshal the property in such manner as to carry that intention into effect."

The form of the surrogate's sentence or decree for the settlement of the account, and also of that for distribution, will be treated of at a future page of the present subject, when all the directions prescribed by the statute relative to either of them, and all the points and questions to be determined thereby, and which determinations are to be comprised therein, have been in their due order considered.

Provisions as to Disposition of Property still in Executor's hands, and Securities not yet due.

With respect to the above section, numbered 72, relating to the disposition of the personal property, and of bonds and securities not yet due, still remaining in the hands of the executor or administrator at the time of the distribution, it is necessary only to observe, that in case of the appraisement of any personal property under the same, an order for the appointment of the appraisers must be duly entered, and that their appraisement should be rendered in writing and filed with the surrogate. It will be proper, also, in drawing the decree for distribution, briefly to recite those proceedings, if any such have taken place.

The 73d section provides for suing and recovering upon any securities which may have been assigned under the preceding section. The revisors, in their notes,^(yy) say that "the object of these sections is to retain any chattels the family may desire to preserve, and to take out of the hands of the administrator, as speedily as possible, the effects of the estate, so as to close his accounts."

(x) *Halsey v. Reed*, 9 Paige, 446.

(y) 1 Paige, 190.

(yy) 3 R. & or S. (2d ed., Appendix,) 644.

The 74th section makes provision for retaining for a claim not yet due, or on which a suit may be pending at the time of the accounting.

To authorize the surrogate, upon the settlement and distribution of the estate in the hands of an administrator, to allow him to retain a portion of the estate for the payment of outstanding claims, there must be a representation, and proof on the part of the administrator, that such claims probably exist against the estate.⁽²⁾

There must be something more than a mere suggestion of the existence of an unsettled demand—the executor or administrator should produce competent evidence of a probably valid claim, in order that the surrogate may judge whether there are reasonable grounds for apprehension of future liability, and that he may see that the proposition to retain is not made for the purpose of enabling the executor or administrator to delay payment of moneys in his hands belonging to the estate. The same rule applies whether the accounting be at the instance of a claimant or voluntary, and also to proceedings under the 18th section, 2 R. S. 116.^(a)

The proceedings on compelling an executor to account, under the above section of the statute, numbered 57, for the proceeds of a sale of real estate, made by him under the will of the deceased, will be governed in all respects by the provisions and directions contained in this chapter, for compelling an executor to render an account of the personal property of the testator.

The jurisdiction conferred upon a surrogate in whose office a will is proved, to call the executors to account for the proceeds of real estate sold by them, for the payment of debts and legacies, under a power contained in the will, extends to wills made previous to the passing of the statute on this subject, as well as to those executed subsequent to that time.^(b)

Where, by the provisions of the will, there is an equitable conversion of real estate into personal property, the surrogate, independently of this statute, has jurisdiction to compel the executor to account for the proceeds of a sale of real estate. Thus, where the testator devised and bequeathed all his real and personal estate to his executors, in trust to sell the same whenever they should see fit; also with authority to lease the same, and directed the executors to divide the whole trust estate into nine equal parts, and pay over and convey one of said parts to each of his four children who were of age, and to hold the remaining five parts until his minor children should respectively become of age, and to pay over and convey to them their shares as they should become of age; it was held, that the executor could be compelled to account before the surrogate, not only for the personal estate bequeathed to him, but also for the rents and profits of the real estate, and for the proceeds of such real estate as he had sold pursuant to the directions contained in the will. And it seems, upon the doctrine of equitable conversion, that under such a will the whole estate is to be considered as personal estate from the death of the testator, so that the rents and

(2) *Hallett v. Hare*, 5 Paige, 315.

(a) See *ante*, pp. 325, 342, 405, 420.

(b) *Clark v. Clark*, 8 Paige, 152.

profits of the real estate received by the executor, and the proceeds of a sale thereof made by him, become legal assets in his hands, for which he is bound to account as personal estate.(c)

Of Distribution in Cases of Intestacy.

The subject of the distribution by administrators of the surplus remaining after the payment of the debts in cases of intestacy, remains to be treated of. Such distribution is provided for and regulated by the following sections of the statutes:

Sec. 75. Where the deceased shall have died intestate, the surplus of his personal estate remaining after payment of debts, and where the deceased left a will, the surplus remaining after payment of debts and legacies, if not bequeathed, shall be distributed to the widow, children or next of kin of the deceased, in manner following:

1. One third part thereof to the widow, and all the residue, by equal portions among the children, and such persons as legally represent such children, if any of them shall have died before the deceased.

2. If there be no children, nor any legal representatives of them, then one moiety of the whole surplus shall be allotted to the widow, and the other moiety shall be distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leave a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to a moiety of the surplus as above provided, and to the whole of the residue where it does not exceed two thousand dollars; if the residue exceed that sum, she shall receive, in addition to her moiety, two thousand dollars; and the remainder shall be distributed to the brothers and sisters, and their representatives.

4. If there be no widow, then the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. In case there be no widow, and no children, and no representatives of a child, then the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives.

6. If the deceased shall leave no children, and no representatives of them, and no father, and shall leave a widow and a mother, the moiety not distributed to the widow shall be distributed in equal shares to his mother, and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

(c) *Stagg v. Jackson*, 2 Coms. 206. See "act to provide for the settlement of the accounts of testamentary trustees," S. L., 1850, 587; 2 R. S. (4th ed.) 279, *supra*. See, also, *Bloodgood v. Bruin*, 2 Bradf. Surr. Rep. 8.

An interest in a contract for the purchase of land is real estate, and descends to the heirs of the purchaser. And if the administrator of the purchaser receives rent for such land, accruing after the death of the intestate, he is bound to account for it as well as for the amount received by him upon a sale of the intestate's interest in the land. *Griffith v. Beecher*, 10 Barb. S. C. Rep. 432.

7. If the deceased leave a father and no child or descendant, the father shall take a moiety if there be a widow, and the whole if there be no widow.^(d)

8. If the deceased leave a mother, and no child, descendant, father, brother, sister or representative of a brother or sister, the mother, if there be a widow, shall take a moiety; and the whole, if there be no widow. And if the deceased shall have been an illegitimate, and have left a mother, and no child, or descendant, or widow, such mother shall take the whole, and shall be entitled to letters of administration in exclusion of all other persons, in pursuance of the provisions of this chapter. And if the mother of such deceased shall be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.^(e)

The Legislature, on the 18th April, 1855, passed the following act:

Sec. 1. Illegitimate children, in default of lawful issue, may inherit real and personal property from their mother, as if legitimate; but nothing in this act shall affect any right or title in, or to, any real or personal property already vested in the lawful heirs of any person heretofore deceased.

Sec. 2. This act shall take effect immediately.^(ee)

9. Where the descendants, or next of kin of the deceased, entitled to share in his estate, shall be all in equal degree to the deceased, their shares shall be equal.^(f)

10. When such descendants, or next of kin, shall be of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

11. No representation shall be admitted among collaterals, after brothers' and sisters' children.

12. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

13. Descendants, and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased, and had survived him.

Sec. 76. If any child of such deceased person shall have been advanced by the deceased, by settlement or portion of real or personal estate, the value thereof shall be reckoned with that part of the surplus of the personal estate which shall remain to be distributed among the children; and if such advancement be equal or superior to the amount which, according to the preceding rules, would be distributed to such child, as his share of such surplus and advancement, then such child

(d) 2 R. S. 97; 4th ed. 282.

(e) S. L. 1845, chap. 236, p. 257; 2 R. S. (4th ed.) 282.

(ee) S. L. 1845, chap. , p. .

(f) 2 R. S. 97; 4th ed. 283.

and his descendants shall be excluded from any share in the distribution of such surplus.^(g)

Sec. 77. But if such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much only as shall be sufficient to make all the shares of all the children, in such surplus and advancement, to be equal, as near as can be estimated.

Sec. 78. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement within the meaning of the two last sections; nor shall those sections apply in any case where there shall be any real estate of the intestate to descend to his heirs.^(h)

Sec. 79. The preceding provisions respecting the distribution of estates, shall not apply to the personal estates of married women; but their husbands may demand, recover and enjoy, the same as they are entitled by the rules of the common law.

Sec. 80. If letters of administration on the estate of a married woman shall be granted to any other person than her husband, by reason of his neglect, refusal, or incompetency to take the same, such administrator shall account for, and pay over the assets remaining in his hands, after the payment of debts, to such husband or his personal representatives.⁽ⁱ⁾

Sec. 80. Where a distributive share is to be paid to a minor, the surrogate may direct the same to be paid to the general guardian of such minor, and to be applied to his support and education; or he may direct the same to be invested in permanent securities, as before provided in respect to legacies to minors, with the like authority to apply the interest, and subject to the same obligations.^(j)

Sec. 81. When administration is granted to any person not the widow of, or next of kin to, a deceased person, and no one shall appear to claim the personal estate of the deceased within two years after such letters granted, the surplus of such estate which would be distributed as aforesaid, shall be paid into the treasury of this state, for the benefit of those who may thereafter appear to be entitled to the same.^(j)

The above section, numbered 75, provides for the distribution of the surplus of the personal estate remaining after the payment of the debts, where the deceased died intestate, and of the surplus remaining after the payment of the debts and legacies, where the deceased left a will not bequeathing such surplus. The 76th, 77th and 78th sections relate to advancements. These provisions have not been heretofore inserted in these pages, or considered, because, as has been stated, it was deemed expedient, in treating of the different subjects within the scope of this work, to follow as nearly as practicable the arrangement of the Revised Statutes, and also, because, as was likewise stated, the distribution of the surplus remaining after the payment of the debts in case of intestacy, or of the residuary estate left undisposed of by a will, is nowhere expressly made the duty of the administrator or executor, unless on proceedings taken against him by a

(g) 2 R. S. 97; 4th ed. 283.

(h) Ib. 98; 4th ed. 283.

(i) 2 R. S. 75; 4th ed. 259.

(j) 2 R. S. 98; 4th ed. 283.

person entitled,(k) as to which the practice has been in several cases described,(l) or until a final settlement of the administrator's or executor's accounts, and distribution thereon.

Of the Rights of the Widow in the Distribution of the Effects of her Intestate Husband, under the Statute.

With respect to the rights of the widow of the deceased in the distribution, the above 75th section, it will be observed, provides that if the deceased left children, as well as a widow, one-third shall go to the widow; and the residue among the children. If there be no children, nor any legal representatives of them, then a moiety shall go to the widow, and a moiety to the next of kin of the deceased entitled under the provisions of the section; and the third subdivision of the section defines the case in which the widow shall be entitled to the whole surplus, and also the case in which she shall be entitled to an excess over and above the moiety, to the amount of \$2,000.

"The widow's title, however, under the statute, may be barred by a settlement before marriage, excluding her from her distributive share of her husband's personal estate; and even in the case of a female infant, she may be barred of her right by such a settlement, made before marriage, with the approbation of her parents or guardians.

"In such cases, whether the husband die intestate, or dispose of his personal estate by will, which disposition fails by lapse, the wife will be equally excluded from her distributive share.

"But it is otherwise when the husband, *by will*, makes a provision for his wife, stating it to be in lieu and bar of all her claims on his personal estate, and then subjects his personalty to a disposition which lapses or is void, so that the latter fund is subject to distribution; for then, notwithstanding the words of the will, the widow is entitled to a share under the statute.(l)

Of the Rights of the Children of the Deceased and their Representatives to Distribution under the Statute.

After the allotment of a third to the widow, the statute directs a distribution of the residue "by equal portions among the child, and such persons as legally represent such children, if any of them shall have died before the deceased." In case there be no widow, then, by the 4th subdivision, the whole surplus is to "be distributed equally to and among the children, and such as legally represent them."

By the words "such as legally represent such children," their lineal representatives to the remotest degree are admitted.

"But the term must be understood of descendants, and not next of kin; as, for example, if a son of the intestate is dead, leaving a widow

(k) An administrator is not bound to distribute without a previous order for that purpose. *Archbishop of Canterbury v. Tappin*, 8 Barnw. & Cress. 151. See 2 Kent, Comm. 420.

(l) *Ante*, pp. 405, 420, 446 *et seq.*

(ll) *Wms.* 1278.

and child, the widow shall take nothing, and the child the whole of the father's share: yet the widow, though not strictly one of the next of kin, is, in the same sense as the child, a legal representative of the personal estate of the father.

"To attain a clear apprehension of the present subject, three sorts of cases may be supposed: First, where none of the intestate's children are dead; secondly, where the intestate's children are all dead, all of them having left children; thirdly, where some of the intestate's children are living, and some dead, and such as are dead have each of them left children.

"On the first hypothesis, that is to say, where none of the intestate's children are dead, it is sufficiently obvious, that after the wife has had her third allotted to her, the remaining two-thirds shall, pursuant to the statute, be equally divided among all the children of the intestate; as in this case they all claim in their own right.

"A brother or sister of the half-blood shall be equally entitled to a share with one of the whole blood; inasmuch as they are both equally near of kin to the intestate.^(m)

"A posthumous child, by the 12th subdivision of the same 75th section, has also the same rights.

"If the intestate leave only one child, such case is not to be considered as omitted by the statute: therefore, in case the intestate also leave a wife, she shall only have a third part, and the other two-thirds shall go to such child. And where the intestate leaves an only child and no widow, although, literally speaking, there can be no distribution, yet such only child shall be entitled to the whole personal estate.

"Secondly, where the intestate's children are all dead, all of them having left children. If a father have three children, John, Mary and Henry, and they all die before the father, John leaving, for instance, two children, Mary three, and Henry four, and afterwards the father die intestate, in that case all his grandchildren shall have an equal share; for as his children are all dead, their children shall take as next of kin. Such, also, would be the case with respect to the great-grandchildren of the intestate, if both his children and grandchildren had died before him. In these instances the parties are said to take *per capita*, or, in other words, equal shares in their own right.

"Thirdly, where some of the intestate's children are living, and some dead, and such as are dead have each of them left children. In this case, the children of the deceased children take *per stirpes*, that is to say, not in their own right, but by representation. Thus, for example, if a father have three children, John, Mary and Henry, and John die, leaving four children, and Mary die, leaving two, and Henry alone survive the father; on the death of the father, intestate, one-third shall be allotted to Henry, one-third to John's four children, and the remaining third to Mary's two children; for these grandchildren are entitled as representing their respective parents."⁽ⁿ⁾

The end and intent of the statute was to make the provision for all the children of the intestate equal, as near as could be estimated.

(m) See subdv. 12.

(n) Wms. 1283-45, and cases cited.

Accordingly, the 76th section of the statute proceeds to provide that, if any child of such deceased person shall have been advanced by the deceased, by settlement or portion of real or personal estate, the value thereof shall be reckoned with that part of the surplus of the personal estate which shall remain to be distributed among the children; and if such advancement be equal or superior to the amount which, according to the preceding rules, would be distributed to such child as his share of such surplus and advancement, then such child and his descendants shall be excluded from any share in the distribution of such surplus.

But, by the 77th section, if such advancement be not equal to such amount, such child or his descendants shall be entitled to receive so much only as shall be sufficient to make all the shares of all the children, in such surplus and advancement, to be equal as near as can be estimated. And the 78th section provides that the maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement within the meaning of the two last sections; nor shall those sections apply in any case where there shall be any real estate of the intestate to descend to his heirs.

The present provisions of the statutes respecting distribution and advancement, are the same in principle as the 16th section of the act concerning executors, &c., (1 Revised Laws of 1813, p. 313,)^(o) which was copied nearly *verbatim* from the English statutes of 22 and 23 Car. II, cap. 10, and 1 Jac. II, cap. 17, both of which are stated by Lord Hardwicke, in *Stanley v. Stanley*,^(p) to be "very incorrectly penned."

(o) The following is the 16th section referred to:

XVI. *And be it further enacted*, That just and equal distribution of what remaineth clear of the goods and personal estate of any person dying intestate, after all debts, funeral charges and just expenses, first allowed and deducted, shall be made amongst the wife and children, or children's children, if any such there be, or otherwise to the next of kin to the intestate, in equal degree, or legally representing their stocks; that is to say, one third part of the surplus to the wife of the intestate, and all the residue, by equal portions, to and amongst the children of such person dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children who shall have any estate by settlement, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall, by such distribution, be allotted to the other children to whom such distribution is to be made; and in case any child shall have any estate, by settlement from the said intestate, or shall be advanced by the said intestate, in his lifetime, by portion not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate shall be distributed to such child or children as shall have any land by settlement from the intestate, or, where advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated; and in case there be no children, nor any legal representatives of them, then one moiety of the said estate shall be allotted to the wife of the said intestate, and the residue of the said estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and those who represent them; but no representation shall be admitted among collaterals after brothers' and sisters' children; and in case there be no wife, then all the said estate shall be distributed equally to and amongst the children; and in case there be no child, then to the next of kin, in equal degree, of or unto the intestate, and their legal representatives as aforesaid, and in no other manner. *Provided, however*, That if, after the death of a father, any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her.

(p) 1 Atk. 455.

The revisers, in their notes,(g) say that they conformed those parts of the section, which were most defective, to the decisions; but made no alterations in principle. The term deceased was substituted for intestate, in order to provide for the case where there is a will which does not bequeath the estate. The part respecting advancement was deemed more proper for a separate section.

This just and equitable provision respecting advancements has been also said to be derived from the *collatio bonorum* of the imperial law, which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe that, with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of the sister kingdom of Scotland; and, with regard to lands descending in co-parcenary, that it has always been, and still is, the common law of England, under the name of hotch-pot.(r)

The former provision in the statute was held to apply only to the case of actual intestacy; and where there was an executor, and, consequently, a complete will, though the executor might be declared a trustee for the next of kin, they took as if the residue had been actually given to them. Therefore, a child advanced by his father in his life, or provided for in the will, could not be called on to bring his share into hotch-pot.(s) And notwithstanding the words "such deceased person," in the 76th section, include all deceased persons mentioned in the preceding section, whether dying intestate or leaving a will, not bequeathing a portion of the personal property, yet it is apprehended that it was not designed to alter the law in this particular, and that the present statute is to be construed with reference to the previous decisions. This view is supported by the fact that the revisers have not noted any change in the law in this respect, which, without doubt, they would have done had a change been intended, and, by their remark above quoted, that they made no alterations in principle, in the present sections, from the former one.

"This provision applies only to the distribution of the estates of intestate fathers; and therefore, if a mother, being a widow, advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotch-pot. This was decided by Lord King, C., on the principle that the statute was grounded on the custom of London, which never affected a widow's personal estate, and that the act seems to include those alone within the clause of hotch-pot who are capable of having a wife as well as children, which must be husbands only.(t)

"The statute takes nothing away that has been given to any of the children, however unequal that may have been. How much soever it may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotch-pot what

(g) 3 R. & or. S., App. (2d ed.) 645.

(r) 2 Black. Comm. 190, 517; Wms. 1286.

(s) Wms 1286-7, and cases cited.

(t) "Holt v. Frederick, 2 P. Wms. 357."

he has before received. This manifestly seems to be the intention of the act, grounded upon the most just rule of equity—equality.

“If a child, who has received any advancement from his father, shall die in his father’s lifetime, leaving children, such children shall not be admitted to their father’s distributive share, unless they bring in his advancement; since, as his representatives, they can have no better claim than he would have had, if living.

“A child advanced in part, shall bring in his advancement only among the other children: for no benefit shall accrue from it to the widow.

“It remains to consider what is, and what is not, to be regarded as an advancement out of the personal estate of the father, so as to exclude a child from a distributive share of the whole or part of the residue.

“A provision made for a child by settlement, whether voluntary or for a good consideration, as that of marriage, is such an advancement.

“It is not requisite, to constitute an advancement, that the provision should take place in the father’s lifetime. If by deed he settle an annuity, to commence after his death, on one of his children, it is an advancement. So, a portion secured to the child, although in *futuro*, is an advancement. Thus, a portion for a daughter, to be raised out of land on her attaining the age of eighteen, or the day of her marriage, was held to be an advancement to her when she married, although she was under that age, and unmarried at the time of the intestate’s death.(u)

“An annuity is an advancement to be brought into hotch-pot, viz., the value at the date of the grant; or, if it has ceased, the payments received, at the option of the child.

“On the other hand, small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to a child, as of a gold watch, or wedding clothes, shall not be deemed an advancement: nor shall money expended by the father for the maintenance of a child, nor given to bind him as an apprentice, nor laid out in his education at school, at the university or on his travels.

“It has already been stated, that a provision which a father may make for his child by will, in a case where a testator dies intestate as to part of his personal estate, shall not be brought into hotch-pot. Such a provision as shall be construed an advancement, must result from a complete act of the intestate in his lifetime, by which he divested himself of all property in the subject: though, as it has just appeared, it is not requisite that it should take effect in possession till after his death. Still less shall property given or bequeathed to a child by any other person be so denominated: and least of all, shall a fortune of his own acquisition, however great.”(v)

The Rights of the Next of Kin of the Intestate under the Statute of Distributions.

The second subdivision of the section provides that, if there be no children, nor any legal representatives of them, one moiety of the whole

(u) “*Edwards v. Freeman*, 2 P. Wms. 435.”

(v) Wms. 1287-92, and cases cited.

surplus shall be allotted to the widow, and the other moiety shall be distributed to the next of kin of the deceased, entitled under the provisions of the section. And by the 5th subdivision, in case there be no widow, and no children, and no representatives of a child, then the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives; but the 11th subdivision enacts, that no representation shall be admitted among collaterals after brothers' and sisters' children.

The next of kin referred to by the statute, are to be ascertained by the same rules of consanguinity as those which determine who are entitled to letters of administration.^(w) These rules have been already considered in a former part of this work :^(x) but it may be convenient to repeat in this place some of their results.

"The mode of calculating the degrees in the collateral line, for the purpose of ascertaining who are the next of kin, so as to be entitled in distribution, conforms to that of the civil law; and is as follows: to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending; or, in other words, to take the sum of the degrees in both lines to the common ancestor."^(y)

According to that rule, the intestate and his brother are related in the second degree, the intestate and his uncle in the third degree. The half blood are admitted equally with the whole blood, for they are equally as near of kin.^(z)

"When a child dies intestate, without wife or child, leaving a father, the latter is entitled, as the next of kin in the first degree, to the whole of the personal estate of the intestate, exclusive of all others."^(a)

"If a man dies intestate, without a child, but leaving a widow and a father, then the personal estate shall go in moieties between the wife and father."^(b)

So, formerly, with respect to the mother, before the statute of 1 Jac. II, c. 17, if a child had died intestate, without a wife, child or father, his mother was entitled, as his next of kin in the first degree, to his whole personal estate.^(c) But now, as has been observed, she shares equally with the brothers and sisters.^(d) She is excluded, lest, by remarrying, she would carry all the personal estate to another husband, in entire exclusion forever of the brothers and sisters; but she still takes the whole personal estate as against more remote relations of the intestate.^(e)

It is clear that the mother-in-law or stepmother of an intestate, not

(w) *Lloyd v. Tench*, 2 Ves. sen. 214; 2 Black. Comm. 515; Toller, 381; 4 Burn. E. L. 280, 8th ed.

(x) *Ante*, p. 211, *et seq.*

(y) See Wms. 345; *ante*, p. 212; 2 Black. Comm. 203 *et seq.*; 2 Kent Comm. 422; *Sweeney v. Willis*, 1 Bradf. Surr. Rep. 495.

(z) 2 Kent's Comm. 422.

(a) See subdv. 7.

(b) *Ib.* Wms. 1293.

(c) Wms 1293.

(d) Subdv. 6.

(e) 2 Kent's Comm. 423. See subdv. 8.

being of his blood, can claim nothing under the Statute of Distribution.

If the intestate left neither children nor parents, but his nearest surviving relations be brothers and sisters, and a grandfather or grandmother, then, since they are all in the second degree of kindred, in strictness they ought all to share the personal estate of the intestate equally, under the statute. But it has been decided in England, and it is also the better construction of the novel of Justinian, that the brother of the intestate will exclude the grandfather of the intestate. This was so decided in *Pool v. Wilshaw*, in 1708; and Lord Hardwicke, in *Evelyn v. Evelyn*,^(f) followed that determination, as being correct, though it may be considered an exception to the general rule. He said it would be a very great public inconvenience to carry the portions of children to a grandfather, and contrary to the very nature of provisions among children, as every child may properly be said to have *spes accrescendi*.^(g)

"Nevertheless, if the intestate leaves no nearer kindred than a grandfather or grandmother, and uncles or aunts, the grandfather or grandmother, being in the second degree, will be entitled to the whole personal estate, exclusive of the uncles or aunts, who are only in the third degree.^(h)

"Hence, also, great-grandfathers or great-grandmothers, being in the third degree, are entitled to a distributive share with uncles and aunts.

"Where the intestate leaves a grandfather by the father's side, and a grandmother by the mother's side, his next of kin, they shall take in equal moieties, as being in equal degree, for here dignity of blood is not material.

"Aunts and nieces, uncles and nephews, being all in the third degree, are all equally entitled. Hence, where the intestate left two aunts, and a nephew and niece, children of a deceased brother, Lord Hardwicke ordered the surplus to be divided into four parts equally among them, holding that, as they were all in equal degree, the children were to take in their own right, and not by representation; but that, if their father had been living, he would have been entitled to the whole.⁽ⁱ⁾

"Brothers and sisters of the half blood are entitled to an equal share of the intestate's estate, with the brothers and sisters of the whole blood, and this shall extend to a posthumous brother of the half blood. In *Burnet v. Mann*,^(j) Lord Hardwicke said, he could not distinguish this from the case of a brother *in ventre sa mere* of the whole blood, who was clearly entitled. If, indeed, it were to go to the children born at any distance of time, so as to cause an inconvenience by suspending the distribution, or to cause a taking back again, it might be an objection. But that cannot happen; because the child must be *in rerum natura* at the death of the intestate brother, whose estate is in question; so that,

(f) 3 Atk. 762.

(g) Wms. 1296-7; 2 Kent's Comm. 424.

(h) *Sweezy v. Willis*, 1 Bradf. Surr. Rep. 495; *Bogart v. Furman*, 10 Paige, 496.

(i) "*Durant v. Prestwood*, 1 Atk. 454; *S. P. Lloyd v. Tench*, 2 Ves. sen. 213; *Buissieres v. Albert*, 2 Cas. temp. Lee, 51."

(j) "1 Ves. sen. 156."

at the utmost, it cannot be carried beyond the year in which a distribution is to be made."(*jj*)

In *Jallet v. Hare*,(*k*) the decedent, at the time of her death, left no relatives in the direct line of ascent or descent, and her nearest collateral relations were an aunt, of the half blood of the decedent's father, and another aunt, of the full blood, on the side of the mother; and it was held that the two aunts were entitled to share equally in the distribution of the decedent's personal estate.

The twelfth subdivision of the present section of the statute expressly provides, that relatives of the half blood shall take equally with those of the whole blood in the same degree. It was contended, on the argument in the case above cited, that the last clause of that subdivision prevents a relative of the half blood from taking, unless his or her descendants could also take by representation. "It is evident, however," said the Chancellor, "that such was not the intention of the Legislature. The object of this provision of the statute," he continued, "was merely to declare, that in cases where relatives of the whole blood were authorized to take by representation, those of the half blood were authorized to take by representation in the same manner. The rule of law on this subject has not been altered by the Revised Statutes. It has been considered as settled, ever since the decision of the House of Lords in *Watts v. Crooke*,(*kk*) that in successions of personal estates, relatives of the half blood, in equal degrees of cognation to the intestate, take equally with relatives of the whole blood; and that they also take by representation, where representation would be allowed among relatives of the whole blood of the same degree."(*l*)

Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property under the statute. Therefore, if the intestate had a son and daughter, and they both die, the former leaving a wife and the latter a husband; upon the intestate's death afterwards, such husband and wife have neither of them any claim on the estate.(*ll*)

The eleventh subdivision provides that no representation shall be admitted among collaterals, after brothers' and sisters' children. This provision must be construed to mean brothers and sisters of the intestate, and not as admitting representation, when the distribution happens to fall among brothers and sisters who are remotely related to the intestate; for the intestate is the subject of the act—it is his estate, his wife, his children, and for the same reason, his brothers' and sisters' children; for he is equally correlative to all. Therefore, if the intestate should leave an uncle, and the son of another uncle deceased, the latter shall have no distributive share. So, if the next of kin of the intestate should be nephews and nieces, a child of a deceased nephew or niece will not be admitted to share in the distribution.(*m*) Again, it

(*jj*) Wms. 1297-8. See subd. 13.

(*k*) 5 Paige, 315.

(*kk*) Show. Cases in Parl. 108.

(*l*) See 2 Vern. 124; *S. C.*, *Burnet v. Mann*, 1 Ves. sen. 156; *Harris' Justinian*, 370, n.; 1 *Strahan's Domat*. 658.

(*ll*) Wms. 1298.

(*m*) *Doughty v. Stowell*, 1 Bradf Surr. Rep. 300.

has been held that if the brother of the intestate left a grandson, and a sister left a child, the grandson shall not have distribution with the son or daughter of the sister. Thus, although, as it has already appeared, lineal representatives, *ad infinitum*, shall share in the distribution of an intestate's personal estate, yet, among collaterals, except only in the instance of the intestate's brothers' and sisters' children, proximity of blood shall alone give a title to it.(mm)

If the intestate's brothers and sisters were, at the time of his decease, all dead, and having left children, such children shall all take *per capita*. Therefore, if an intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister shall take ten parts in eleven with the son of the deceased brother. But in the event of some of the intestate's brothers and sisters being alive and some dead, and such as are dead having left children, such children take *per stirpes*, by way of representation. Therefore, if an intestate left a brother alive, and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and their uncle the other.(n)

It is the doctrine under the Statute of Distributions, that the claimants take *per stirpes* only when they stand in unequal degrees, or claim by representation; and then the doctrine of representation is necessary. But where they all stand in equal degree, as three brothers, three grandchildren, three nephews, &c., they take *per capita*, or each an equal share; because, in this case, representation, or taking *per stirpes*, is not necessary to prevent the exclusion of those in a remoter degree; and it would be contrary to the spirit and policy of the statute, which aims at a just and equal distribution. If a person dies without children, leaving a widow and mother, brother and sister, and two nieces by a deceased brother, then, according to the established doctrine, the widow would take a moiety, and the mother, brother and sister would each take one-fourth, and the two nieces the other one-fourth of the remaining moiety.(nn)

If the deceased was an illegitimate, and left a mother and no child, descendant or widow,—by the 8th subdivison of the section as amended by the act of the 13th May, 1845, the mother takes the whole of the surplus; and if the mother shall have died, the relatives of the deceased on the part of the mother take in the same manner as if the deceased had been legitimate.(o)

The death of the widow or one of the next of kin of the intestate, within the time fixed by the statutes for calling the administrator to account, does not entitle the surviving next of kin of the intestate to the whole of the personal estate; but the share of such deceased widow or next of kin is vested and belongs to his or her personal representatives.(p)

(mm) See Wms. on Exrs. 1299; 2 Kent Com. 425.

(n) Wms. 1299.

(nn) *Keylway v. Keylway*, 2 P. Wms. 344; *Stanley v. Stanley*, 1 Atk. Rep. 457; 2 Kent Com. 425-6.

(o) The act of 13th May, 1845, is given entire in subdv. 8, *supra*.

(p) *Rose v. Clark*, 8 Paige, 574.

Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors or administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate;(g) but if after his death, it is real estate; as the equity of redemption descends to the heir at law.(r) The administrator of a mortgagor, therefore, is not entitled to the surplus moneys arising from a sale of mortgaged premises under a decree in Chancery; such surplus goes to the heirs, and is assets in their hands; and when the heirs, being infants, were before the court by their parent, it was ordered to be distributed as equitable assets.(s)

Of Distribution where the Deceased, at the time of his Death, was Domiciled Abroad.

This may be the proper place to consider the subject of the disposition of the personal property left within this state, of a deceased person, who, at the time of his death, was domiciled abroad.

Hitherto it has been assumed that the intestate was, at the time of his death, domiciled in a place where the Statute of Distributions is the law of the land.

It has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to and distribution of personal property, wherever situated, is governed by the law of the country in which the owner or intestate was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time. The principle applies equally to cases of voluntary transfer of intestacy and of testaments.(t)

This rule, as to the succession and distribution of personal property, is settled in England, and by the general usage of nations, and has repeatedly been declared to constitute a part of the municipal jurisprudence of this country.(u) It is not, however, correct to say that, with respect to the distribution of personal property, the law of the land gives way to the law of a foreign country; but that it is a part of the law of the land that personal property should be distributed according to the *jus domicilii*. If, therefore, a man die domiciled in this country, and administration be taken out to him here, debts due to him, or other of his personal effects, in another state or in a foreign country, shall be distributed according to the law of this state; for the *lex loci rei sitæ* is not to be recognized. On the other hand, if a foreigner, domiciled abroad, die intestate, his whole property here is distributable according to the laws of the country where he was so domiciled.(v)

(g) See *Bogart v. Furman*, 10 Paige, 496; *Sweeney v. Willis*, 1 Bradf. Surr. Rep. 495.

(r) Wms. 474.

(s) *Moses v. Murgatroyd*, 1 Johns. Ch. Rep. 119.

(t) 2 Kent's Comm. 429; Wms. on Exrs. 1301.

(u) 2 Kent's Comm. 431.

(v) See Wms on Exrs. 1301-2.

The like rule prevails in the ascertainment of the person who is entitled to take as heir or distributee. The law of the domicil, therefore, is to decide whether primogeniture gives a right of preference, or an exclusive right to the succession; and, whether a person is legitimate or not, to take the succession. So, whether persons are to take *per capita* or *per stirpes*; and the nature and extent of the right of representation.^(w)

Hence, it appears that a different doctrine prevails with respect to the distribution of the personal estate of a deceased, when in the hands of an executor or administrator, from that which is established with respect to the grant of probate or administration, by which he is empowered to possess himself of such estate; for, with regard to the latter, the *situs* of the property, as it has appeared in an earlier part of this treatise, regulates the jurisdiction.^(x)

The difficulty has been, not in the rule itself, but in the application and execution of it. The question has repeatedly arisen as to the rights of the creditors of the deceased non-inhabitant, and other persons interested in his estate, resident within the country where the particular portion of his property was situated, and where the new administration was taken out, whether a court of equity would proceed to decree an account and distribution according to the *lex loci rei sitæ*, or direct the assets to be distributed by the foreign tribunal of the domicil of the deceased. The general American rule seems to be, that the new administration is made subservient to the rights of creditors, legatees and distributees, *resident within the country*; and that the residuum is transmissible to the foreign country *only* when the final account has been settled in the proper domestic tribunal, upon the equitable principles adopted in its laws.^(y)

"It remains to ascertain what shall constitute a domicil with respect to the proper application of the above rule. A man's domicil is *prima facie* the place of his residence; but this may be rebutted by showing that such residence is either constrained from the necessity of his affairs, or transitory. On this subject, the following propositions may be stated as deducible from the adjudged cases:

"1. Though a man may have two domicils for some purposes, he can have only one for the purpose of succession.

"2. The original domicil, or, as it is called, the *forum originis*, or the domicil of origin, is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil.

"The domicil of origin is that arising from a man's birth and connections.

"It appears, from the terms of the proposition under consideration, that such a domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains

(w) Story's Conf. of Laws, 403.

(x) Wms. 1302. See *ante*, ch. 3, p. 204; ch. 4, p. 220.

(y) See 2 Kent's Comm. 420 and 434, *note*, where the cases are collected and reviewed; Story's Conf. of Laws, 423.

until a subsequent domicil be acquired, unless the party die *in itinere* towards an intended domicil.

"3. The proposition last stated is equally true of an acquired, as of an original, domicil. Therefore, an acquired domicil cannot be lost by mere abandonment, but continues until the intention of another change of domicil is carried into execution.

"It may further be mentioned on this point, that a new domicil cannot be acquired by a party's own act during pupillage, nor until the party is *sui juris*.

"4. After the death of the father, children remaining under the care of the mother, follow the domicil which she may acquire, and do not retain that which their father had at his death, until they are capable of gaining one by acts of their own.

"This rule is, however, it appears, subject to the condition that the domicil shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession; and it should seem, by the opinion of an eminent foreign jurist,^(z) that such fraud will be presumed, if no reasonable motive can be assigned for the change."^(a)

The disposition of the personal property under the will of a person dying domiciled abroad, properly forms a part of the present subject.

"Where the will or testament is made in the place of the domicil of the testator, the general rule of the common law is, that it is to be construed according to the law of the place of his domicil, in which it is made. A will, therefore, made of personal estate in England, is to be construed according to the meaning of the terms used by the law of England; and this rule equally applies, whether the judicial inquiry, as to its meaning and interpretation, arises in England, or in any other country.

"So, whether the words of the will give a legacy, or create a trust in favor of a party, where the expressions used import a wish or desire, or other language of a similar sort is used, must be decided by the law of the place where the will is made and the testator has his domicil. So, where a legacy is given in terms expressive of a currency in use in different countries, but of different values therein, the same rule will apply. So legacies are deemed payable according to the law of the country, and in the currency of the country, where the will is made and the testator is domiciled.

"In like manner, the question whether a legatee, by the terms of a foreign will or testament, takes an estate for life or in fee, is to be decided by the law of the place where the will is made and the testator is domiciled, and not by the law of the place where the controversy arises or the testator was born. So, if the question arises, whether it is competent to make a particular bequest of property, the validity of it must be decided by the law of the place where the will or testament is made, and the testator is domiciled. So, if a legacy is given by a will or testament to a party who dies in the lifetime of the testator, the question, whether it is an ademption of the legacy, or whether the leg-

(z) "Pothier, in the introductory chapter to his treatise on the Custom of Orleans."

(a) Wms. 1303-4, and cases cited; 2 Kent's Comm. 430, *Ib.* note. And see *Curling v. Thornton*, 2 Add. 17; *Stanley v. Bernes*, 3 Hagg. 441; 4 Hagg. 346.

acy goes to his personal representatives, is to be decided by the law where the will or testament is made and he is domiciled.

"The same rule will apply to the ascertainment of the persons who are to take under a will or testament, when it is made by words designating a particular class or description of persons. Who are the proper persons entitled to take under the *designatio personarum*, is a point to be ascertained by the law of the place where the will is made and the testator is domiciled." (b)

Of the Disposition of the Personal Property of Intestate Married Women.

The above section of the statutes, numbered 79, and the following section, numbered 30, govern the disposition of the personal property of intestate married women.

The 79th section exempts the personal estates of married women from the operation of the provisions of the Statute of Distributions, and authorizes their husbands to demand, recover and enjoy the same, as they are entitled by the rules of the common law. The section numbered 30, directs that in case administration of the estate of a married woman intestate, be granted to any person other than her husband, such administrator shall pay over the surplus, after discharging the debts, to such husband or his personal representatives. The act of 1848, for the more effectual protection of the property of married women, (c) as amended by the act of 1849, (d) provides, that the real and personal property of a married woman shall not be subject to the disposal of her husband, nor liable for his debts, but shall be her sole and separate property, as if she were a single female; and that any married female may take by inheritance, or by gift, grant, devise or bequest from any person, other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband, nor be liable for his debts.

"The acts of 1848 and 1849," it was laid down by the surrogate of the county of New York, in *McCosker v. Golden*, (e) "do not undertake to disturb the law in regard to the estates of married women dying intestate. They are authorized," continues the learned surrogate, "to take, hold, convey and devise; but, in default of a will, the estate is transmitted, after death, precisely as it was before these acts were passed. A married woman may sell or bequeath her personal estate; but if she dies intestate, the law declares who shall take it. Now, as before, if she dies intestate, the husband may demand administration; or if a stranger administer, he is entitled to the residue, after payment of debts; and as to him the Statute of Distributions is a nul-

(b) Story's Conf. of Laws, 402, and cases cited.

(c) S. L. 1848; 2 R. S. (4th ed.) 331.

(d) S. L. 1849; 2 R. S. (4th ed.) 331.

(e) 1 Bradf. Surr. Rep. 64.

lity. That statute does not apply to the case of a *feme covert* dying intestate." The learned surrogate supports this view of the statute, by citing several English decisions as to the disposition of the personal property of a married woman dying intestate, held under a marriage settlement or contract, to her use, with the same power and control as if she were sole and unmarried, and making no provision for its disposition after death, in which cases it has been held that the husband took such property.(f) He regards these English decisions as clearly in point, with reference to the construction of these statutes, and concludes his opinion in the case as follows: "I cannot, accordingly, see that these acts, which have enabled a married woman to have the sole control and absolute ownership of her property during her life, with power to sell and convey, and also to regulate its disposition after her death, have at all altered the law as to the administration of her personalty, in case of intestacy. Where the wife has failed to exercise the privilege conferred upon her by these new statutes, and dies intestate, possessed of personalty, her husband has still the sole right to administer, and, as administrator, to retain the residue of the estate, after the payment of debts, to his own use. The right of representation, unless he be incompetent, and the right of succession to the property, are still exclusively vested in him, to be defeated only by a valid will."

The surrogate of the county of Erie is stated to have decided the same point the same way, pursuing a similar line of reasoning. But the doctrine has not been entirely unquestioned. In *Paine v. Bartlett, Administrator, &c.*, in the Superior Court of the city of New York, at special term, Mr. Justice Hoffman, after an elaborate and able examination of the question, declared his opinion, that the statute of 1848 has superseded the right of the husband to the wife's property, where the marriage was after the act, although he survives her; that although the formal right to administer may still be in him, he becomes a trustee for the next of kin, and that the next of kin to the married woman intestate, were entitled in distribution to her personal property. This case was heard, upon appeal, at the general term of the court; but it was decided there upon another point. It is proper to mention, however, that it is understood that if the learned justices at the general term had found themselves called upon to determine the point in question, their decision would not have sustained the judgment of the learned justice at special term. The construction and effect of these statutes may, therefore, be regarded as unsettled; but the view taken by the learned surrogate of the county of New York in the case quoted, is probably that which will be adopted by the courts.(g)

(f) *Salmon v. Hays*, 4 Hagg. 386; *Mollony v. Kennedy*, 10 Simons, 254; *Proudley v. Fielder*, 2 M. & K. 57.

(g) The reported decisions under these statutes afford but little light upon the question. It has been held that they cannot operate to divest a husband of his right as tenant by the curtesy, where the marriage took place before the act, nor to dispossess him of the right to the rents and profits of her real estate during coverture, in the same state of facts. It has also been held that the wife may not directly convey her dower right to her husband. *Graham v. Van Wyck*, 7 How. Prac. Rep. 373; *Hurd v. Cass*, 9 Barb. S. C. R. 366; *Van Sickie v. Van Sickie*, 8 How. Prac. Rep. 265; *White v. White*, 4 How. Prac. Rep. 103. The Court of Appeals, it is understood, have recently decided, in the case of *Westervelt v. Gregg*, that the

Of Securing the Distributive Shares of Minors.

Under the above section, numbered 80, the surrogate may direct the distributive share of a minor to be paid to his guardian, or to be invested, as before provided(*gg*) with respect to legacies to minors. It will be observed, that the surrogate is not required to demand security from the guardian before directing the payment to him of a minor's distributive share, as he is before directing the like payment of a legacy. But it is without doubt competent for him, if he distrust the entire adequacy of the guardian's responsibility, to direct the payment to be withheld until satisfactory security be given, and to order the distributive share in the meantime to be invested.

The 81st section directs, in certain cases, the payment into the state treasury of the surplus which would otherwise be distributed.

Of the Form of the Surrogate's Decree.

The practice on an accounting before the surrogate having thus been gone through with, and some of the various topics and questions which present themselves for consideration in the course of the proceedings, having thus been discussed, some remarks are now to be offered with respect to the form of the surrogate's final sentence or decree in the matter, and also of the decree for distribution.

It is not within the design of this work to consider how far the surrogate's decree in the case of an accounting, or in any other case, will be of itself, in a subsequent suit or controversy, evidence of any other facts stated in it than those of which it is by the statute expressly made conclusive against the parties. It can only be stated that it is common to include, in the final decree for distribution, various statements of facts which, although they may not strictly be received as evidence in any collateral inquiry, are, nevertheless, a necessary portion of the history of the proceedings, and may become of importance to render the decree intelligible, and to assist and guide future investigations into the matter.

The decree for settlement of the account is usually very simple and brief in its form. It has been seen that, by statute, (*h*) the surrogate is required to record with his decree a summary statement of the account as the same shall have been finally settled and allowed by him, which is to be referred to and taken as part of the final decree. This statement is made in the surrogate's minutes, setting forth in separate items the total assets which originally came into the hands of the executor or administrator on his assuming the duties of the trust, the increase or decrease thereof, if any, the disbursements for necessary expenses of the administration, the payments made of the debts due by the estate, the sums applied to the discharge of legacies or distributed among those entitled in distribution, and the balance remaining in the hands of the executor or administrator. At the foot of this summary the sentence

statute of 1848 does not deprive a husband, married previous to 1848, of the right to reduce into possession the personal property of his wife not reduced into possession previously to the passing of those statutes.

(*gg*) See *ante*, p. 404.

(*h*) See *ante*, pp. 26-7.

is pronounced, declaring the accounts of the executor or administrator finally settled, and allowed according to the statement. (For form of the final decree, see Appendix, No. 74.)

The decree for distribution is made out separately, and is generally of greater length.^(h) The preliminary proceedings in the case are usually stated in substance at the commencement of the decree, and the proper allegations are there inserted to show jurisdiction in the surrogate. The return of the order or citation, and the appearances of those who attend the accounting, whether in person or by attorney, or proctor, or by general or special guardian, are there recited. The facts of the service of the citation upon absentees, either personally or constructively by publication, and their default in not appearing, although, as was stated, not strictly matters within the immediate cognizance of the surrogate, are next set forth. If there has been a reference to an auditor, it should be so stated in the decree, and the substance of his report should be given, and its confirmation or modification should be recited. The surrogate's determinations as to the rights of creditors, the construction and legality of the bequests, and the title and claims of legatees, whether special, general, or residuary, and as to the title of any person claiming as widow or next of kin, should be fully and clearly expressed. The sum apportioned to each individual, or directed to be reserved or deposited to meet claims not yet due, or not decided, or to be invested for the benefit of minors, should be distinctly specified in dollars and cents. The consent of parties to the transfer or assignment of property or securities remaining in the hands of the executor or administrator should be stated. If there has been an appraisement thereof, the same, as has been already mentioned, may properly be stated; and the particular articles or securities to be transferred or assigned to each person should be designated. The mandatory parts of the decree will order the executor or administrator to pay over, reserve or invest moneys, or to transfer or assign property or securities according to the apportionment determined upon.

With respect to the costs of the accounting, the general principle to be adopted from the cases is the just one, that executors are entitled to their costs in settling their accounts so far as they are not in fault, and bound to pay costs, as to such inquiries in the action or proceeding as were caused by their breach of trust.⁽ⁱ⁾ If the party contesting the account subjects the accounting party to useless expense by unfounded objections, he may be properly charged with such costs personally.^(j)

It has heretofore been seen^(k) that the surrogate is not authorized to decree the payment of costs out of the estate of the decedent in the hands of his personal representatives, to the exclusion of their commissions for receiving and paying out moneys, if the amount in their hands

(h) In the court of the surrogate of the county of New York, it is now the practice to embody in a single decree the settlement and distribution. Such a decree will unite all the particulars above specified for two several decrees for those purposes. (For form of such decree, see Appendix, No. 74.)

(i) *Ray* agt. *Van Hook*, 9 How. Prac. Rep. 427; *Griffith v. Beecher*, 10 Barb. S. C. Rep. 432.

(j) *Gardner v. Gardner*, 7 Paige, 112, 115; *Westervell v. Gregg*, 1 Barb. Ch. Rep. 469.

(k) *Ante*, p. 493.

is not sufficient to pay both. If it is a proper case to charge them with the costs of the adverse party upon the proceedings, there should be a decree against them directly and personally for the payment of such costs.^(l)

If the accounting has taken place, and has been conducted throughout and concluded, at the instance of a single party, without bringing in other persons in interest, the decree will merely decide as to his rights; and, if it be in his favor, order payment to him of the sum adjudged due. If such party be a creditor who has obtained a judgment against the executor or administrator, whether after a trial at law upon the merits or otherwise, or if there be any such creditor among the parties to an accounting, where all the persons in interest have been called in to attend, the decree will designate the amount applicable to such judgment; and if requested, an order will be made which may be embodied in the decree, that an execution issue on such judgment. Such execution will, agreeably to what was stated at a preceding page,^(m) direct the money to be levied of the goods, &c., of the testator or intestate in the hands of the executor or administrator. A remedy in nearly all conceivable cases more effectual may be had, as will presently appear, by proceedings under the surrogate's decree for the payment of the money.

(For forms of decrees upon accounting, see Appendix, No. 74.)

The decree for payment or distribution may be drawn up by the successful party, or, where there has been a final settlement of the accounts, by the executor or administrator. It is frequently, however, prepared at the surrogate's office. If it be drawn by a party, it should be settled in conformity with the rules and practice of the Supreme Court on the settlement of a decree.

Of Enforcing the Surrogate's Decree.

The enforcing of the decree of the surrogate remains to be considered.

An action at law upon the decree may be brought against the executor or administrator by any party, to compel payment of any sum of money thereby adjudged due to him.

A complaint may be filed by the distributees, to compel the executor or administrator to distribute the estate of the decedent according to the sentence or decree of the surrogate, made upon a final accounting before him.⁽ⁿ⁾

Proceedings, however, before the surrogate, to compel the performance of the decree, afford a very speedy and effective remedy.

If the decree direct the executor or administrator to transfer or deliver any specified articles, or to assign any particular securities belonging to the estate, and which have been proved to be in his hands, his neglect or refusal to comply with such directions will be a contempt, and his obedience may be compelled by attachment, or his bond may

(l) *Halsey v. Van Amringe*, 6 Paige, 12.

(m) *Ante*, p. 339.

(n) *Stiles v. Burch*, 5 Paige, 132.

be prosecuted under the 19th section, 2 R. S. 116, presently to be stated at large.

The following sections of the statutes provide for enforcing decrees of surrogates for the payment of money.

Sec. 19. Whenever an executor or administrator shall refuse or omit to perform any decree, made against him by a surrogate having jurisdiction, for rendering an account, or upon a final settlement, or for the payment of a debt, legacy or distributive share, such surrogate may cause the bond of such executor or administrator to be prosecuted, and shall apply the moneys collected thereon in satisfaction of such decree, in the same manner as the same ought to have been applied by such executor or administrator.(o)

Sec. 63. After any decree is made by a surrogate for payment of money by an executor or administrator, or guardian, on application, he shall make out a certificate, stating the names of the parties against and in favor of whom the decree is made, with the trade, profession or occupation of the parties respectively, in their places of residence, in which he shall state the amount of debt and costs directed to be paid by such decree.(p)

Sec. 64. On such certificate being filed with the clerk of any county, the same shall be entered and docketed on the books now required by law to be provided and kept for the purpose of docketing judgments, the transcripts or certificates of which shall be filed with such clerk, and shall thenceforth be a lien on all the lands, tenements, real estate and chattels real, of every person against whom such decree shall be entered, situate in the county in which said surrogate's certificate may be filed; and execution shall be issued thereon in the same manner as though the same was a judgment recovered in the Court of Common Pleas [now except in the city and county of New York, the county court(q)] of said county.(r)

Sec. 65. If such execution be issued and returned unsatisfied, the surrogate shall, on application, assign the bond given by such executor, administrator or guardian, to the person in whose favor such decree is made, for the purpose of being prosecuted.(s)

It may be proper to remind the reader, that the foregoing sections of the statutes, and the means now to be spoken of for enforcing the decrees of the surrogate, extend to decrees made under the 18th section, 2 R. S. 116, authorizing the surrogate to decree payments in the cases there mentioned.

The above section, numbered 19, authorizes the surrogate to cause the bond of an executor or administrator to be prosecuted, if he refuse or omit to perform any decree made against him, upon a final settlement, or for the payment of a debt, legacy or distributive share. The above section, numbered 63, directs, that after a decree for payment of

(o) 2 R. S. 116; 4th ed. 300.

(p) S. L. 1837, 535; 2 R. S. (4th ed.) 421, sec. 17.

(q) See Constitution, art. 14, sec. 12. See, also, the act "in relation to the judiciary," Laws of 1847, chap. 280, article 4th, sec. 36, p. 330; Code of Procedure, sec. 29, 30. The suggestion of this insertion is made, however, not without some misgivings. The section seems to be omitted in the last (4th) edition of the Revised Statutes. See 2d vol. p. 421, n.

(r) S. L. 1837, 535; Amend. S. L. 1844, 91.

(s) S. L. 1837, 535; 2 R. S. (4th ed.) 421, sec. 18.

money against an executor or administrator, the surrogate shall, on application, make out a certificate, stating certain particulars in such section specified. By the next section, numbered 64, the certificate, on being filed with the clerk of any county, and entered and docketed by him, becomes a lien upon the land of an executor or administrator, and an execution may be issued thereon, in the same manner as though the same was a judgment recovered in the Court of Common Pleas of said county. And the next section, numbered 65, provides, that if such execution be issued, and returned unsatisfied, the surrogate shall, on application, assign the bond given by such executor or administrator to the person in whose favor the decree was made, for the purpose of being prosecuted.

The sections respecting the issuing of the execution on the decree, do not seem to affect the operation of the 19th section, in cases of decrees for the payment of money. The party may probably take his remedy to enforce such a decree under either provision. If he resort to the 19th section, he must obtain an order of the surrogate for the prosecution of the bond, upon evidence satisfactory to the surrogate that there has been either a refusal or an omission to perform the decree. The bond is prosecuted under the direction of the surrogate, and he applies and pays over the moneys collected thereon, in satisfaction of the decree.

To sustain an action upon an administrator's bond put in suit for the benefit of a creditor or other claimant, it is necessary to show a decree of the surrogate for the payment of the debt or claim, and the refusal or neglect of the administrator to comply with such decree, as well as the order of the surrogate, directing the prosecution of the bond.(f)

The statute, however, does not require the service on the executor or administrator of a copy of the decree, or a citation to appear and show cause why an order for the prosecution of the bond of the executor or administrator should not be made, previous to the making of any such order. If it is made to appear satisfactorily to the surrogate, that there has been either a refusal or an omission to perform the decree, he is authorized to order the prosecution of the bond without any previous service of a copy of the decree, or of a summons on the executor or administrator to show cause. In the case of *The People v. Rowland*,^(u) the order proved on the trial recited, that the petition of P. N., one of the heirs, duly verified, on which the order was founded, set forth a service on the administratrix of a copy of the decree, and a demand by the petitioner of the sum decreed to be paid to him, and her refusal to pay. This, it was held, was sufficient evidence of a refusal to perform the decree, and authorized the surrogate to make an order for the prosecution of the bond of the administratrix. "A demand," it was said, "previous to the commencement of the suit, of the money directed by the decree to be paid, was not necessary." "The statute," it was added, "does not make such demand a condition precedent to the right to sue the bond of the administratrix. Without any proof of a demand, the surrogate had authority to make an order for the

(f) *The People v. Barnes*, 12 Wend. 492.

(u) 5 Barb. Sup. Ct. Rep. 449.

prosecution of the bond. He was only to be satisfied that there had been either a refusal or an omission to perform the decree."

Since the law of 1837, however, it is proper to state, recourse has seldom been had to the 19th section, to enforce decrees for the payment of money; the proceedings authorized by the above sections of that law having been deemed more effectual for the purpose.

A party having obtained a decree against an executor or administrator for the payment of money, in case of non-payment, always applies for and procures a certificate under the above 63d section, and thus coerces payment. The application should be in writing, and, on granting the same, an entry of the issuing of the certificate may properly be made in the surrogate's minutes. (For form of the certificate, see Appendix, No. 75.)

After having filed his certificate, the party is governed by the same rules, in respect to the issuing and return of his execution, which apply to executions on judgments in the county court, or in the Court of Common Pleas of the city and county of New York. The execution may issue immediately upon filing the transcript.

The 64th section (amendment of 1844) provides, that the "execution shall be issued on the certificate, in the same *manner* as though the same was a judgment recovered in the Court of Common Pleas of said county." This does not go to the *form* of the process; the execution should recite the facts truly. It should state the filing of the certificate of the surrogate's decree and the docket, and then command the sheriff to levy the money.(v)

The decree is a lien on the lands of the executor or administrator, after the filing of the certificate, and the entering and docketing on the books of the county clerk; and the execution should direct the money to be levied of the property of the executor or administrator, and not of the property of the testator or intestate.(v)

The 65th section provides, that if the execution be issued and returned unsatisfied, the surrogate shall, on application, assign the executor's or administrator's bond to the person in whose favor the decree has been made, for the purpose of being prosecuted. A transcript of the docket of the certificate, and a certified copy of the execution, and of the sheriff's return, must be furnished to the surrogate, as proof that the proceedings of the party have been regular, and that the execution has been returned unsatisfied. An order for the assignment of the bond should be entered in the surrogate's minutes. (For form, see Appendix, No. 76.) The surrogate's order constitutes the assignment of the bond contemplated by the statute. The surrogate is not a party to the bond, and, in the nature of things, cannot execute an assignment as an obligee. He commonly acts by order, and this order, by its terms, "assigns" the bond "for the purpose of being prosecuted." This is, in substance and effect, the only assignment contemplated by the statute.(w) The direction in the section, that the surrogate assign the bond, is probably not to be construed to require him to part with the custody of

(v) *Davies v. Skidmore*, 5 Hill, 504.

(w) *Baggett v. Boulger*, 2 Duer, 170.

the instrument. That must remain in his possession for safe keeping, as there may, perhaps, be other or future claims to be enforced under it.

Notwithstanding the assignment, the surrogate retains the custody of the instrument, for the common benefit of all persons having claims against the estate. The assignment contemplated by the statute is, in fact, only the grant of a permission or authority to prosecute the bond.

There is not any objection to the action being brought in the name of the party who has obtained the decree of the surrogate against the executor or administrator. It is a useless proceeding to bring the action in the name of "The People on the relation of" such party; whether sued in the name of the party for whose benefit it is ordered to be prosecuted, or in the name of the people, the same facts are to be stated, the same number of separate suits may be had, and the consequences are the same in either case to the sureties. The common law rule, that an action on a bond must be brought in the name of the obligee, whoever may be the owner, is abrogated by the Code. It must now be brought "in the name of the real party in interest."^(x) The person in whose favor the decree of the surrogate has been rendered against the executor or administrator, is the real and only party in interest prosecuting the action. The Code says that he may sue in his own name.^(xx)

A party recovering upon the bond, will have judgment only for the amount decreed in his favor. Several persons, in whose favor decrees for payment may have been made, may doubtless join in one suit.

These sections plainly apply to all decrees for the payment of money. A creditor, legatee, or a person entitled in distribution, who has obtained a decree against the executor or administrator, under the 18th section, 2 R. S. 116, authorizing the surrogate to decree payment against the executor or administrator of debts, after the expiration of six months, and of legacies and distributive shares, after the expiration of a year from the time of the granting of the letters, may obviously enforce such decree by the proceedings above described, under the 19th section, 2 R. S. 116, or by issuing an execution, and pursuing the remedy provided by the above sections of the acts of 1837 and 1841.

It is apparent that these sections, in nearly all cases, supersede the necessity of issuing an execution upon a judgment recovered against an executor or administrator. When such judgment has been obtained, after a trial at law upon the merits, and at an early period of the administration, there may be an advantage in immediately prosecuting the remedy, by execution thereon, against the assets in the hands of the executor or administrator. But a creditor who has recovered his judgment, otherwise than after a trial upon the merits, or after such trial, when a sufficient time has elapsed to authorize the surrogate to decree payment of the debt, will find his most effectual and satisfactory remedy under the sections which have now been considered. There can hardly be a case in which an execution against the executor or administrator personally will not prove at least

(x) Code, sec. 3; 2 R. S. 476, title 5, chap. 8, part 3; Code, sec. 471.

(xx) *Baggott v. Boulger*, 2 Duer, 170-1.

equally as beneficial as one against the assets of the deceased alone in his hands.(y)

The separate consideration of the subjects of the rendering and settling of the accounts of executors and administrators, and the enforcing performance of the decrees of the surrogate against them, is thus concluded.

The rendering and settling of the accounts of an executor or administrator whose authority has ceased, or has been revoked or superseded, may be compelled, and must be conducted in the same manner, and has the like effect in all respects, as in the case of a settlement at the instance of a creditor.(yy) Such accounting will be hereafter more particularly considered, in connection with the proceedings on the removal of an executor or administrator from his office, and the revocation of his letters.

When letters of collection are superseded, and the collector is cited to account, he may be compelled to deliver to the party succeeding to the administration of the estate, all the property of the deceased in his hands; and it is competent for the surrogate, on the accounting, to pass upon any claim of the collector to property belonging to the deceased at the time of his death, of which the collector acquired title during the period of his collectorship. But where the collector claims title to certain leasehold estate of the deceased, by virtue of a lease from the owner of the fee, made prior to his appointment as collector, the surrogate has not jurisdiction on the accounting of the collector to try the validity of a title thus acquired, before the fiduciary relations of the collector with the estate commenced.(z)

It is convenient in this place to present some observations upon the jurisdiction of the courts of equity over the executor or administrator, with respect to the administration of the goods and effects of the deceased.

"An executor or administrator is liable, in his representative character, to all equitable demands, with regard to personal property, which existed against the deceased at the time of his death.

"Executors and administrators are, in almost every respect, considered in courts of equity, as trustees. Upon this principle, those courts exercise a jurisdiction over them, in the administration of assets, by compelling them, in the due execution of their trust, to apply the property to the payment of debts and legacies, and the surplus, according to the will, or in case of intestacy, according to the Statute of Distributions.

"Hence, a court of equity will entertain a bill for a personal legacy; or for the distribution of an intestate's personal estate: and will compel an executor or administrator, in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them."(a)

(y) For directions as to the mode of issuing an execution against the assets of the decedent, in the hands of the executor or administrator, see *ante*, p. 339, Code, sec. 289, *Olsted agt. Vredenburg*, 10 How. Pr. Rep. 215.

(yy) See 2 R. S. 95, *secs.* 68, 69.

(z) *Gottsberger v. Smith*, 2 Bradf. Sur. Rep. 86.

(a) *Wms. on Exrs.* 1717, and cases cited.

In *Currow v. Mowatt*,^(b) the Vice-Chancellor says, "under our present system, a surrogate possesses more enlarged powers than formerly: but I am not aware of anything which lessens the jurisdiction of this court. In the exercise of its powers, there is certainly a competency of inquiring into any alleged *devastavit* by an executor or administrator, and also the right to bring all persons before it who may be interested in the question. The forms of proceeding and the practice of the court are well adapted to the purposes of such an inquiry; and, while a decree can be made to reach the property and persons of all who may be liable, the relative equities of such parties will be adjusted and enforced."

In *Rogers v. King*,^(c) the Chancellor says, "the surrogate has concurrent jurisdiction with this court, to call an executor or administrator to account. And if the same party who files a bill in this court against such executor or administrator, subsequently cites him to account before the surrogate, the pendency of the suit here, for the same object, ought to be allowed by the surrogate as a valid objection to the proceeding there, in the nature of a plea in abatement. And where, in a suit properly instituted in this court, by any other creditor, legatee, or distributee of the estate, a decree for an account has been entered, for the benefit of all the creditors and other persons interested in the estate, such decree may be set up as a bar to any proceeding for an account before the surrogate. And this court, upon a proper application, would grant an injunction, as a matter of course, to stay any creditors or others from proceeding before the surrogate, and to compel them to come in and establish their claims under the decree here."^(cc)

Where, to determine the liability of parties, it is necessary to require the accounts of several estates, it would seem that the Court of Chancery alone has jurisdiction.^(d)

The Court of Chancery had jurisdiction to compel a foreign executor or administrator to account for the trust funds which he received abroad and brought with him into this state; and that, too, without taking out letters of administration on the estate of the decedent here. And upon a bill filed against such foreign executor or administrator, if he is about to depart and go beyond the bounds of the state, he may be arrested upon a *ne exeat* and held to equitable bail, as in other cases.^(e)

In a suit here, however, against a foreign executor or administrator, for assets received in the country where he was appointed and brought into this state, the nature and extent of his liability will depend upon the laws of the state or country where he derived his authority to administer the assets of the decedent. And the assets must be applied in the payment of debts, or be distributed among the next of kin, accord-

(b) 2 Edw. Ch. Rep. 64.

(c) 8 Paige, 211.

(cc) *Moore v. Prior*, 2 Young and Colb. Rep. 375; *Paxton v. Douglass*, 8 Ves. 520; *Perry v. Phelps*, 10 Idem. 39; *Clark v. Ormond*, Jacob's Rep. 122.

(d) *Foster v. Wilber*, 1 Paige, 537.

(e) *McNamara v. Dwyer*, 7 Paige, 239. But see *Brown v. Brown*, 1 Barb. Ch. Rep. 189.

ing to the law of that country, and which would be applicable to the case if he had been called to account there.^(ee)

A bill in Chancery ought not to be filed for a legacy; application should be made to the surrogate.^(f)

The appellate jurisdiction of the Supreme Court over cases arising in the Surrogate's Court will hereafter, as was before intimated, form the subject of a separate branch of this work.

CHAPTER XIII.

OF THE AUTHORITY OF THE EXECUTOR OR ADMINISTRATOR OVER THE REAL ESTATE OF THE DECEASED, AND OF SALES OF SUCH REAL ESTATE, WHETHER VOLUNTARY OR COMPULSORY, FOR THE PAYMENT OF THE DEBTS OF THE DECEASED.

THE general rule has been stated in a preceding page of this work,^(a) that "as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to do with the lands, tenements and hereditaments." But it was at the same time intimated, that where the personal property of the decedent is insufficient for the payment of his debts, the executor or administrator may, by proper proceedings according to law, acquire dominion over the real estate for the purpose of disposing of the same and applying the proceeds to the discharge of such indebtedness. By the express provisions of the will, also, the executor is often vested with a power over the real estate.

The first case now to be considered, is that of a sale, or other disposition of the real estate of the decedent, by the executor or administrator, for the payment of debts, where the decedent died intestate, or did not authorize such disposition by his will. Sales by an executor, pursuant to a power given by the will, will in the next place be treated of.

By the hard and unjust rule of the common law, land descended or devised was not liable to simple contract debts of the ancestor or testator; nor was the heir bound even by a specialty, unless he was expressly named. But, in New York, the rule has been altered; and, by a provision in the act of 1786, and continued in the subsequent revisions, heirs are rendered liable for the debts of the ancestor by simple contract, as well as by specialty, and whether specially named or not, to the extent of the assets descended, on condition that the personal estate of the ancestor shall be insufficient, and shall have been previously exhausted.^(aa) This condition does not apply when the debt is, by the will of the ancestor, charged expressly and exclusively upon the real estate descended to the heirs, or directed to be paid out of the real estate descended, before resorting to the personal estate.^(b) It is

^(ee) See note (e), p. 550.

^(f) *Hoyt v. Hilton*, 2 Edw. Ch. Rep. 202.

^(a) *Ante*, p. 236. See *Griffith v. Beecher*, 10 Barb. S. C. 432.

^(aa) See *Ferguson v. Broome*, 1 Bradf. Surr. Rep. 10.

^(b) 2 R. S. 452; 4th ed. 694, secs. 32, 33, 34, 35.

further provided, that whenever any real estate, subject to a mortgage executed by the ancestor or testator, shall descend to the heirs, or pass to a devisee, the mortgage shall be satisfied out of such estate, without resorting to the executor or administrator, unless there be an express direction in the will to the contrary.(c)

The general rule is that the personal estate is the primary fund for the discharge of the debts, and is to be first applied and exhausted, even to the payment of debts with which the real estate is charged by mortgage; for the mortgage is understood to be a merely collateral security for the personal obligation. The order of marshalling assets in equity towards the payment of debts is to apply: 1. The general personal estate. 2. Estates specifically devised for the payment of debts. 3. Estates descended. 4. Estates devised, though generally charged with the payment of debts. It requires express words, or the manifest intent of a testator, to disturb this order. On the other hand, there is a material distinction between debts originally contracted by the testator or intestate, and those contracted by another; and, therefore, if a person purchases an estate subject to a mortgage, and dies, *his personal estate*, as between him and his personal representatives, shall not be applied to the exoneration of the land, unless there be strong and decided proof that, in taking the incumbered estate, he meant to take upon himself the mortgage debt as a personal debt of his own. The last provision above mentioned, from the Revised Statutes, was an alteration of the antecedent rule, and makes a mortgage debt fall primarily upon the real estate.(d)

By sec. 12 of the article of the Revised Statutes relative to suits by and against executors and administrators, the real estate which belonged to any deceased person shall not be bound, or in any way affected, by any judgment against his executors or administrators, nor shall it be liable to be sold by virtue of any execution issued upon such judgment.(e)

If the personal estate of a testator or intestate be insufficient to pay his debts, the executor or administrator, as the case may be, is authorized to mortgage, lease, or sell so much of the real estate as shall be requisite to pay the debts. This is done under the direction of the Surrogate's Court; and the title so conveyed to the purchaser will vest in him all the right and interest which belonged to the testator or intestate at the time of his death. The proceedings, in such cases, are specially detailed in the Revised Statutes, and the amendments thereto, with cautious provisions to guard against irregularity and abuse. The interest of the deceased in contracts for the purchase of land may equally be sold for the like purposes; and provision is made for the specific performance of the contracts, under the direction of the surrogate, upon terms safe and just to all parties. The sale of the real estate of the testator or intestate, by the executor or administrator, under the orders of the Surrogate's Court, will, it is supposed,(f) apply to the

(c) 1 Rev. Stats. 749; 4th ed. (2d vol.) 156, sec. 4; 4 Kent's Commentaries, 420. See *ante*, p. 303.

(d) 4 Kent's Comm. 421.

(e) 2 R. S. 449; 4th ed. 691.

estate left by the debtor at his decease, and avoid all mesne conveyances since his death.^(g)

A proper division of the first branch above stated of the present subject, is into sales or other dispositions of the real estate of the deceased, made—first, pursuant to an order of the surrogate, granted on the application of the executor or administrator; second, pursuant to the like order granted on the application of a creditor of the deceased. The proceedings on obtaining the order for the sale are entirely regulated by statute. Such regulations are contained in the 4th title of the 6th chapter of the 2d part of the Revised Statutes,^(h) entitled “of the powers and duties of executors and administrators, in relation to the sale and disposition of the real estate of their testator or intestate,” and in certain provisions of the laws of 1837, 1843 and 1850.

Of the Proceedings by an Executor or Administrator to Procure an Order to Mortgage, Lease or Sell the Real Estate of his Testator or Intestate for the Payment of his Debts.

By the first section of the above mentioned title of the Revised Statutes,⁽ⁱ⁾ after the executors or administrators of any deceased person shall have made and filed an inventory according to law, if they discover the personal estate of their testator or intestate to be insufficient to pay his debts, they may, at any time within three years after the granting of their letters testamentary or of administration, apply to the surrogate for authority to mortgage, lease or sell so much of the real estate of their testator or intestate, as shall be necessary to pay such debts.

The 40th section of the “act concerning the proof of wills, executors and administrators, guardians and wards, and Surrogates’ Courts,” passed 16th May, 1837,^(j) enacts that executors or administrators may apply to the surrogate, pursuant to the above mentioned title of the Revised Statutes, for authority to mortgage, lease or sell the real estate of their testator or intestate, and for the sale of the interest of such testator or intestate, in any land held under a contract for the purchase thereof, whenever they shall discover that the personal estate of the testator or intestate is insufficient to pay his debts; subject, however to the provisions of the first section of said title, as the same has been amended.

Of the Petition to Mortgage, Lease or Sell.

The proceeding to obtain the order for the sale is by petition to the surrogate. The statements and particulars required to be set forth in such petition, are specially prescribed by the second section of the above

^(f) See *Mathews v. Mathews*, 2 Edw. Ch. Rep. 565.

^(g) See 4 Kent’s Comm. 438.

^(h) 2 R. S. 99; 4th ed. 284.

⁽ⁱ⁾ 2 R. S. 100; 4th ed. 285, amend. act of 1830, chap. 320, sec. 22.

^(j) S. L. 1837, 531; 2 R. S. (4th ed.) 285.

mentioned title of the Revised Statutes, and the petition must be under oath. That section is as follows :

Sec. 2. The petition shall set forth :

1. The amount of the personal property which has come to the hands of the executor or administrator.
2. The application thereof.
3. The debts outstanding against the testator or intestate, as far as the same can be ascertained.
4. A description of all the real estate of which the testator or intestate died seised, with the value of the respective portions or lots, and whether occupied or not, and if occupied, the names of the occupants; and
5. The names and ages of the devisees, if any, and of the heirs of the deceased.

And such petition shall be verified by the oath of the party presenting the same.

All of the executors or administrators should join in an application to the surrogate, for an order to sell the real estate of the decedent for the payment of debts. And an order for sale will be erroneous in allowing the petitioning executors or administrators, to make a sale without the consent and concurrence of all, especially when no reason is stated in the petition for not making the one or those not joining in the petition a party or parties to the proceedings.^(k)

In the opinion of the surrogate in the case of "the real estate of Isaac Lawrence, deceased,"^(kk) the question will be found considered whether debts of the deceased, secured by mortgage of his real estate, ought to be set forth in the petition, under the third subdivision of this section. The conclusion to which the surrogate arrived was, that such debts should not be included until the remedy of the creditor by foreclosure of the mortgage has been exhausted, leaving a balance of debt unpaid, and thereby ascertained, for which the personal estate, if sufficient, would be liable.

The 5th subdivision, where it requires the ages of the devisees and heirs to be stated, is to be understood as requiring that those of the devisees or heirs who may be of full age, should be distinguished from those who may be minors. In order to meet the provisions of the 38th and 39th sections of the law of 1837, presently to be quoted, those of the minors who have a general guardian should be distinguished from those who have not, and those over fourteen years of age from those under that age. The executor or administrator may also include in his petition, besides the statements specified in this section, any statements or explanations which may be important to a due understanding of the situation of the estate, or of the manner in which he has conducted the administration; and if he have knowledge that the requisite moneys can be raised by a mortgage or lease of the real estate, he should state the fact in his petition. The prayer of the petition will be for authority to mortgage, lease or sell so much of the real estate of the deceased as shall be necessary to pay the debts. (For form of the petition, see Appendix, No. 77.)

^(k) *Fitch v. Witbeck*, 2 Barb. Ch. Rep. 161.

^(kk) *Law of Surrogates*, (1st ed.,) Appendix, p. xii.

Before the Revised Statutes, the statutory provision for the sale of the real estate of a deceased person for the payment of his debts, required that the executor or administrator should make a just and true account of the personal estate and debts of the deceased, as far as he could discover the same, and deliver the said account to the judge of the Court of Probates, or to the proper surrogate, and request his aid in the premises.^(l) There is no difference in principle between that provision and the present one. Under that provision it has been held, that a surrogate obtains jurisdiction in reference to the sale of the real estate of a testator or intestate, by the presentation of a petition by executors or administrators praying his aid, and by the exhibition of an account of the personal estate and debts of the deceased.^(m)

And under the present statute it has been expressly held, that upon an application by an administrator, after the filing of an inventory for the sale of the real estate of an intestate for the payment of his debts, the surrogate gains jurisdiction by the presentation of the petition, as against all parties regularly brought into court.^(mm)

Of the Appointment of Guardians of Minors interested.

By the 3d section of the above mentioned title of the Revised Statutes, if it shall appear to the surrogate by such petition, or by other competent evidence, that any of the devisees or heirs of the deceased are minors, the surrogate shall immediately, and before any other proceeding, appoint some disinterested freeholder guardian of such minors, for the sole purpose of appearing for them, and taking care of their interest in the proceedings.

By the 4th section, if any such minors are within the county of such surrogate, they shall be personally served with notice, ten days previously, of the intention to apply for the appointment of a guardian, that they may be heard in the selection of such guardian.

By the 38th section of the law of 1837,⁽ⁿ⁾ where any minor mentioned in the above 3d section, shall have a general guardian in the county of the surrogate, such general guardian shall appear and take care of the interest of the minor, and no special guardian shall be appointed in the premises. And by the 39th section of the same act, the notice required by the above 4th section may be a notice of five days; and where the minor is under fourteen years of age, the notice shall be served on the person in whose custody he may be, or with whom he may live, or on such relative as the surrogate shall designate, instead of the service required by said fourth section.

Where the minor is under the age of fourteen, and has no general guardian, and it is proposed to serve the notice of the intention to apply for the appointment of a guardian for the minor on a relative, an order designating such relative upon whom the notice may be served, should be made and entered in the surrogate's minutes. (For form of the notice of intention, see Appendix, No. 78.) On the day named in

(l) 1 R. L. 1813, 450, sec. 23.

(m) *Jackson v. Irwin*, 10 Wen. 441.

(mm) *Farrington v. King*, 1 Bradf. Surr. Rep. 182.

(n) S. L. 1837, 531; 2 R. S. (4th ed.) 286, sec. 6.

the notice, on proof of the personal service of the notice on the minor, or on the person in whose custody he may be, or with whom he may live, or on the relative designated, as the case may be; and after hearing the minor, if he appear, or any person who may appear in his behalf, the appointment of the guardian is to be made. He is appointed by an order duly entered in the minutes. (For form, see Appendix, No. 79.) The order should be served on the person appointed, and after that he will represent the minor in the proceedings.

The law previous to the Revised Statutes provided, "that in all cases where a petition shall be presented by any executors or administrators, for the sale of the whole or part of the real estate of their testator or intestate, and one or more of the devisees or heirs of such testator or intestate shall be infants, the judge of the Court of Probates, or the surrogate to whom the same may be presented, shall appoint some discreet and substantial freeholder a guardian of such infant or infants, for the sole purpose of appearing for, and taking care of the interest of such infants in the proceedings therein." (o)

In a case (p) where real estate had been sold under a surrogate's order, and it did not appear that a guardian had been appointed for the plaintiffs, who were heirs of the estate, and infants at the time of the proceedings before the surrogate, it was held that the sale was void as to them; and Mr. Justice Bronson said—

"The surrogate undoubtedly acquired jurisdiction of the *subject matter*, on the presentation of the petition and account; but that was not enough. It was also necessary that he should acquire jurisdiction over the *persons* to be affected by the sale. It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right, until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into court; and if judgment is rendered against him before that is done, the proceeding will be as utterly void, as though the court had undertaken to act where the subject matter was not within its cognizance." (pp) And he afterwards proceeds, "It is not only a general principle in the law, that courts must acquire jurisdiction over the persons to be affected by their judgments, but in relation to these sales the statute has specially pointed out the means, and imposed the duty, of bringing the proper parties before the court." And, after citing the above section of the Revised Laws of 1813, he continues—"This mode of bringing in the infant heirs was not pursued, and the plaintiffs have had no day in court. Without it they cannot be deprived of their inheritance." And he concludes—"The rule that there must be jurisdiction of the person, as well as the subject matter, has been steadily upheld by the courts; and it cannot be relaxed, without opening a door to the greatest injustice and oppression." (q)

(o) 1 R. L. 1813, 454, sec. 31.

(p) *Bloom v. Burdick*, 1 Hill 139.

(pp) *Borden v. Fitch*, 15 John. R. 121; *Bigelow v. Stearns*, 19 Ib. 39; *Mills v. Martin*, 19 Ib. 7.

(q) See, also, *Schneider v. McFarland*, 2 Coma. 459; *Corwin v. Merritt*, 3 Barb. Sup. Ct. Rep. 341.

Of the Order to Show Cause why Authority should not be given.

By the 5th section of the above mentioned title of the Revised Statutes, (qq) if upon such application to the surrogate, it shall appear that all the personal estate of the deceased, applicable to the payment of debts, has been applied to that purpose, and that there remain debts unpaid, for the satisfaction of which a sale may be made under the provisions of this title, he shall make an order, directing all persons interested in the estate to appear before him, at a time and place therein to be specified, not less than six weeks, and not more than ten weeks from the time of making such order, to show cause why authority should not be given to the executors or administrators applying therefor, to mortgage, lease, or sell so much of the real estate of their testator or intestate, as shall be necessary to pay such debts.

By the 41st section of the law of 1837, (r) however, it is provided, that the surrogate may, in his discretion, order such mortgage, lease or sale to be made, although the whole of the personal property of the deceased which has come to the hands of the executor or administrator, has not been applied to the payment of debts. But the surrogate, before making any such order, shall have satisfactory evidence that the executor or administrator has proceeded with reasonable diligence in converting the personal property of the deceased into money, and applying the same to the payment of debts.

This section is, by necessary implication, a repeal of so much of the above 5th section of the Revised Statutes as requires that, upon such application, it shall be made to appear to the surrogate, to authorize him to issue the order to show cause, that all the personal estate of the deceased, applicable to the payment of his debts, has been applied to that purpose, and that there remain debts unpaid, for the satisfaction of which a sale may be made under the provisions of the title, because now no such facts need be shown even to entitle the executor or administrator to an order for sale. The reader is referred to the above-mentioned opinion of the surrogate(s) for a discussion as to the recitals requisite to be made in the order to show cause. (For form of the order, see Appendix, No. 80.)

Of the Service and Publication of the Order to Show Cause.

The 6th and 7th sections of the above mentioned title of the Revised Statutes provide for the service and publication of the order to show cause. They are as follows:

Sec. 6. Every such order to show cause shall be published for four weeks in a newspaper printed in the county, and a copy thereof shall be served personally, on every person in the occupation of the premises of which a sale is desired, wherever the same may be situated, and on the widow, and heirs and devisees of the deceased, residing in the county of the surrogate, at least fourteen days before the day therein appointed for showing cause. (t)

(qq) 2 R. S. 101, (4th ed.) 286.

(r) S. L. 1837, 531; 2 R. S. 102, sec. 18, 4th ed. 287-8, sec. 19.

(s) Law of Surrogates, (1st ed.,) Appendix, p. xii.

(t) 2 R. S. 101; 4th ed. 286. See *Corwin v. Merrill*, 3 Barb. S. C. R. 341.

Sec. 7. If such personal service cannot be made, or if such widow, heirs or devisees do not reside in such county, but reside in the state, then a copy of such order may be served personally, forty days before the day of showing cause, or by publishing the same once in each week for four weeks in succession, in the state paper. If such heirs or devisees do not reside within this state, or cannot be found therein, the order shall be published once in each week, for six weeks successively, in the state paper, or a copy thereof may be personally served on them, at least forty days before the time appointed therein for showing cause.

These sections are explicit in their provisions, and present no difficulties in practice.

Of the Hearing on the Return of the Order to show Cause.

By section 8, of the same title, the surrogate, at the time and place appointed in the order, and at such other times and places as the hearing shall be adjourned to, upon due proof of the service and publication above required, shall proceed to hear and examine the allegations and proofs of the executors or administrators applying for such authority, and of all persons interested in the estate, who shall think proper to oppose the application.(u)

By section 9, the executors or administrators may be examined on oath, and witnesses may be produced and examined by either party; and process to compel their attendance and testimony may be issued by the surrogate, in the same manner and with the like effect as in cases of proving wills before him.

By section 10, on such hearing it shall be competent to any heir or devisee of the real estate in question, and to any person claiming under them, to show that the whole of the personal estate of the deceased has not been duly applied by the executors or administrators to the payment of his debts; to contest the validity and legality of any debts, demands or claims, which may be represented as existing against the testator or intestate; and to set up the Statute of Limitations in bar to such claims; and the admission of any such claim so barred, by any executor or administrator, shall not be deemed to revive the same so as in any way to affect the real estate of the deceased.

It is proper to observe that so much of this section as declares that it shall be competent to any heir or devisee of the real estate in question, and to any person claiming under them, to show that the whole of the personal estate of the deceased has not been duly applied by the executors or administrators to the payment of his debts, is evidently repealed by the provision of the 41st section of the law of 1837, already quoted, authorizing the surrogate, in his discretion, to order a mortgage, lease or sale of the lands to be made, although the whole of the personal property of the deceased which has come to the hands of the executor or administrator, has not been applied to the payment of debts. It is, however, probably competent to the parties named, to show, under the 41st section, that the executor or administrator has

(u) 2 R. S. 101; 4th ed. 286.

not proceeded with reasonable diligence in converting the personal property of the deceased into money, and aplying the same to the payment of debts.

The objections of the heir or devisee, or person claiming under him, against the proceedings of the executor or administrator, or against the validity of any of the claims, should be stated in writing. The examination respecting the validity of the claims will be conducted before the surrogate, according to the same principles which govern similar proceedings in the common law courts. Independently of the provisions of the above recited 10th section of the statute, it has always been held, that in a proceeding before the surrogate, to mortgage, lease or sell the real estate of a deceased person, the heirs or devisees may make the same defence to the claims sought to be established, as they could before any other tribunal.^(u)

By a clause of the 72d section of the law of 1837,^(v) as amended by the act of the 18th April, 1843,^(w) where a judgment has been recovered or decree obtained against an executor or administrator for any debt due from the deceased, and there are not sufficient assets in the hands of such executor or administrator to satisfy the same, the debt for which the judgment or decree was obtained, shall, notwithstanding the form of such judgment or decree, remain a debt against the estate of the deceased to the same extent as before, and to be established in the same manner as if no such judgment or decree had been obtained. Provided, that where such judgment or decree has been obtained upon a trial or hearing upon the merits, the same shall be *prima facie* evidence of such debt before the surrogate. Under this provision the record of the judgment, or an exemplified or sworn copy thereof, must be produced, in order that the surrogate, from an inspection thereof, may see that the existence of the debt was put in issue by the pleadings, and was passed upon by the jury, so as to constitute a trial of the cause upon the merits, within the meaning of the statute. And before the surrogate is authorized to make any order for the mortgaging, leasing or sale of the real property of the decedent, he must be satisfied by legal proof that the debts, for the purpose of satisfying which the application is made, are justly due and owing from the testator or intestate, as against the owners of the real estate.^(x)

Even where a judgment has been obtained against an executor or administrator, and there was a trial or hearing upon the merits, the judgment, on an application to sell the real estate, is, by the statute, only *prima facie* evidence of the debt. It does not change the nature or character of the debt. Where a judgment or decree, against the executor or administrator has been obtained, otherwise than after a trial or hearing upon the merits, the debt remains a debt against the estate, to be established as against the real estate in the same manner as if the

(u) *Ferguson v. Broome*, 1 Bradf. Surr. Rep. 10.

(v) S. L. 1837, 536; 2 R. S. (4th ed.) 293-4.

(w) S. L. 1843, 229; 2 R. S. (4th ed.) 293-4.

(x) *Baker v. Kingsland*, 10 Paige, 368. For a discussion as to the proofs of the debts necessary to be taken on the return of the order to show cause, see the opinion of the surrogate "In the Matter of the real estate of Isaac Lawrence, deceased," above mentioned. Law of Surrogates, (1st ed.,) Appendix, p. xii.

judgment or decree had not been obtained. In the case of a judgment or decree obtained against the executor or administrator after a trial or hearing on the merits, the judgment or decree is *prima facie* evidence of the debt; the requirement that the debt shall be established in the same manner as if the judgment or decree had not been obtained, is, in the first instance, dispensed with, but the previous provision that the debt remains a debt against the estate to the same extent as before, remains in full force. The debt is established *prima facie* by the production of the record showing a trial or hearing on the merits, but then it is the debt which is established, and not the judgment. The heirs are not liable for the costs of the judgment.⁽²⁾ The judgment is not the thing claimed; it does not constitute the debt against the estate of the deceased; it is only *evidence* of the debt, the means provided by statute, in a special case, of proving the debt. The only effect of the production of the record is to establish, *prima facie*, that at the date of the judgment a debt existed against the estate of the deceased to the extent of the amount mentioned in the judgment. The record shows the character of the debt, whether it was a promissory note or otherwise; it also liquidates the amount due on it, but, as against the heir, it does not change the debt into a judgment; on the contrary, the same law which permits the record to be used as evidence, declares, in the same breath, that "notwithstanding the *form* of such judgment," the debt for which it was obtained "shall remain a debt against the estate of the deceased to the same extent as before."^(a)

The operation of this construction upon the Statute of Limitations, must, in many cases, materially affect the rights of parties. The heir has always had the right to set up the Statute of Limitations in bar to such claims, and the admission of the executor or administrator has not been deemed to revive debts barred by the statute so as in any way to affect the real estate.^(b) The privilege is expressly secured to the heir by the provisions of the above quoted 10th section of the statute.^(c) If, then, by the recovery of a judgment against the executor or administrator, the debt is converted from the form of a promise to that of a judgment, a twenty years' limitation would take the place of the limitation of six years. "This," says Mr. Surrogate Bradford, in *Ferguson v. Broome*,^(d) "would be a great inroad upon the rights of those who are entitled to the real estate. It is quite enough," continues the learned surrogate, "to follow the statute in admitting the judgment as *prima facie* evidence of the debt. To make the debt substantially a *judgment* against the heirs or devisees, and to clothe it with all the attributes of a judgment, instead of leaving it where it was, a simple contract debt against the estate of the deceased, would be a clear transgression of the very rule the Legislature has laid down, that the debt shall remain a debt to the same extent as before. * * * There is no difficulty in fix-

(2) *Wood v. Byington*, 2 Barb. Ch. Rep. 387; *Sanford v. Granger*, 12 Barb. S. C. R. 392.

(a) *Ferguson v. Broome*, 1 Bradf. Surr. R. 16; *Sanford v. Granger*, 12 Barb. S. C. R. 392.

(b) *Mooers v. White*, 6 Johns. Ch. Rep. 378.

(c) See *Renwick v. Renwick*, 1 Bradf. Surr. Rep. 234; *Furrington v. King*, *Ib.* 182; *Skidmore v. Romaine*, 2 Bradf. Surr. Rep. 122.

(d) 1 Bradf. Surr. Rep. 10.

ing the time from which the statute begins to run. The rule is the same in the present instance as in other cases of simple contract debts.

Accordingly, in the case quoted, where the creditor of the deceased obtained a judgment upon a simple contract debt against the administrator, on the 30th December, 1841, and proceedings to procure an order to mortgage, lease or sell the real estate of the testator for the payment of his debts were not commenced until the 28th March, 1848, the surrogate considered that the Statute of Limitation was a bar to the claim, and a valid ground of contest on the part of the heirs.(e)

In *Farrington v. King*,(f) in a proceeding before the surrogate to sell the real estate of the decedent for the payment of his debts, upon the question whether the debts claimed were barred by the Statute of Limitations, it was held, that the statute ceases running on the institution of the proceedings or the return of the order to show cause.

An application for the sale of real estate for the payment of debts is not, in a strict sense, an action. As the term of eighteen months after the death of a testator or intestate forms no part of the time limited by law for the commencement of an action against his executors or administrators;(g) and, as an action for the debts of the deceased cannot be brought against his heirs or devisees within three years from the time of granting letters;(h) and proceedings to compel the sale of the real estate for the payment of debts, cannot be instituted by a creditor until the executor or administrator has accounted; and an account cannot be compelled till the lapse of eighteen months after letters issued; the running of the statute is suspended as respects claims against the real estate of the decedent, for the period of such eighteen months after probate, during which, though the estate is represented, the statute forbids proceedings on the part of a creditor to compel a sale of the real estate for the payment of the debts of the deceased.(i) Accordingly, where, on the decease of the testator, the Statute of Limitations had commenced to run against certain simple contract debts, and in consequence of a contest as to the probate, letters testamentary were not granted until five years after, and the six years from the creation of the debt expired after letters were issued, but before the creditors could compel an account,—It was held, that the claims were not barred by the Statute of Limitations.(j)

Where a creditor has sued the executors, and on their offer to permit a recovery for a certain sum, has taken judgment for that amount, the claim is liquidated, and he cannot recover a larger sum in a proceeding to sell the real estate of the deceased for the payment of his debts. The personal estate is the primary fund for the payment of debts, and the measure of recovery against the realty cannot exceed that against the personalty, though it may be less.(k)

(e) 1 Bradf. 20.

(f) 1 Bradf. Surr. Rep. 182.

(g) See *ante*, p. 315, 333.

(h) See 2 R. S. 109; 4th ed. 294.

(i) *Skidmore v. Romaine*, 2 Bradf. Surr. Rep. 122. See, also, *Farrington v. King*, 1 Bradf. Surr. Rep. 182.

(j) *Skidmore v. Romaine*, 2 Bradf. Surr. Rep. 122.

(k) *Ib.*

In proceedings to sell the real estate for the payment of debts, it is competent for the heirs or devisees to show that the personal estate has not been applied to the payment of the debts: but the sale may be ordered by the surrogate, if he has satisfactory evidence that the executor or administrator has proceeded with reasonable diligence in making such application.^(l) However, it is discretionary with the surrogate to refuse the order for the sale when the executor has personal property on hand undisposed of.^(m)

The surrogate, it seems, is not authorized to make an order for the sale of the real estate of a decedent, for the mere purpose of paying the executors or administrators the amount of their claim for the expenses of administration, and where there are no existing debts for which the devisees or heirs at law of the decedent are liable, in respect to the real estate which had come to them by devise or descent. The executor or administrator should retain sufficient of the personal estate in his hands to pay the expenses of the administration. And an order will not be made on his application for the sale of the real estate of the decedent to pay such expenses, after the lapse of three years from the time of granting letters testamentary or of administration to him.⁽ⁿ⁾

Nor does the statute authorize the surrogate to direct the sale of real estate of a deceased debtor, to pay costs which had not been awarded to the creditor, against the decedent, at the time of the death of the latter.^(o)

If a portion only of the heirs object to certain demands, and the objection is sustained, the entire claim must be rejected, and the surrogate cannot reject only such part of the demand as would be the proportion falling on the share of the heirs objecting.^(p)

By the 11th section of the above mentioned title of the Revised Statutes,^(q) if, upon such hearing, (the hearing before the surrogate upon the order to show cause,) any question of fact shall arise, which, in the opinion of the surrogate, cannot be satisfactorily determined without a trial by jury, he shall have authority to award a feigned issue, to be made up in such form as to present the question in dispute, and to order the same to be tried at the next Circuit Court to be held in such county. New trials may be granted therein by the Supreme Court, as in personal actions pending in that court. The final determination of such issue shall be conclusive as to the facts therein controverted in the proceedings before the surrogate.^(r)

By the 72d section of the Code of Procedure, feigned issues are abolished; and, instead thereof, in the cases where the power previously existed to order a feigned issue, or where a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

(l) *Skidmore v. Romaine*, 2 Bradf. Surr. Rep. 122.

(m) *Moore v. Moore*, 14 Barb. S. C. R. 27.

(n) *Fitch v. Wilbeck*, 2 Barb. Ch. Rep. 161.

(o) *Wood v. Dyington*, 2 Barb. Ch. Rep. 387.

(p) *Renwick v. Renwick*, 1 Bradf. Surr. Rep. 234.

(q) 2 R. S. 102; 4th ed. 287.

(r) See *Campbell v. Renwick*, 2 Bradf. Surr. Rep. 80.

By the 12th section of the title, the costs of such issue shall be paid by the party failing, on the order of the surrogate, and such payment may be enforced by him in the same manner as other orders and decrees.

Of entering the Demands adjudged valid.

By the 13th section, the demands which the surrogate shall, upon such hearing, adjudge valid and subsisting against the estate of the deceased, or which shall have been determined to be valid, on the trial of such issue; or which shall have been recovered against the executors or administrators, by a judgment of a court of law upon a trial on the merits; shall be by him entered in a book of his proceedings, fully and at large; and the vouchers supporting the same shall be filed in his office. (For form of the entry, see Appendix, No. 81.)

Where an order has been made for the sale of the real estate, and the surrogate has neglected to enter in his book the demands which, upon the hearing, he has adjudged to be valid and subsisting against the estate, the error can be corrected afterwards by directing such an entry *nunc protunc*.(s)

Of the Order to Mortgage, Lease or Sell.

By sec. 14, the surrogate shall make no order for the mortgaging, leasing or sale of the real property of the deceased, until, upon due examination, he shall be satisfied:

1. That the executors or administrators making such application have fully complied with the preceding provisions of this title.

2. That the debts, for the purpose of satisfying which the application is made, are justly due and owing; and that they are not secured by judgment or mortgage upon, or expressly charged on, the real estate of the deceased: or, if such debts be secured by a mortgage or charge on a portion of such estate, then that the remedies of the creditor, by virtue of such mortgage or charge, have been exhausted.

3. That the personal estate of the deceased is insufficient for the payment of such debts; and that the whole of such estate, which could have been applied to the payment of the debts of the deceased, has been duly applied for that purpose.

So much of the last subdivision of this section as requires that the surrogate should be satisfied that the whole of the personal estate, which could have been applied to the payment of the debts of the deceased, has been duly applied for that purpose, is clearly repealed by the 41st section of the law of 1837,(t) which, it is proper here to repeat, declares that the surrogate may, in his discretion, order such mortgage, lease or sale to be made, although the whole of the personal property of the deceased which has come to the hands of the executor or administrator has not been applied to the payment of debts. But the surrogate, before making any such order, shall have satisfactory evidence

(s) *Farrington v. King*, 1 Bradf. Surr. Rep. 182.

(t) S. L. 1837, 531; 2 R. S. (4th ed.) 287-8.

that the executor or administrator has proceeded with reasonable diligence in converting the personal property of the deceased into money, and applying the same to the payment of debts.

Of determining whether Property shall be mortgaged, leased or sold.

By the 15th section of the above mentioned title of the Revised Statutes, the surrogate, when so satisfied relative to the matters specified in the 14th section, except as to the application of the whole of the personal estate to the payment of the debts, and having satisfactory evidence, according to the 41st section of the law of 1837, shall, in the first place, inquire and ascertain whether sufficient moneys for the payment of such debts can be raised, by mortgaging or leasing the real property of the deceased, or any part thereof; and if it shall appear that such moneys can be so raised, advantageously to the interest of such estate, he shall direct such mortgage or lease to be made for that purpose.^(u)

By sec. 16 of the same title, no such lease shall be for a longer time than until the youngest person interested in the real estate leased shall become twenty-one years of age.^(v)

By sec. 17, a lease or mortgage executed under the authority of the surrogate, as aforesaid, shall be as valid and effectual as if executed by the testator or intestate immediately previous to his death.

It is for the heirs or devisees, or persons claiming under them, to show, if they think fit, that sufficient moneys for the payment of the debts can be raised by mortgaging or leasing the premises. The executor or administrator, however, may properly give such information as he may possess, to enable the surrogate to decide in which way the requisite sum shall be raised. A statement on this point, as has been suggested, may be embraced in the executor's or administrator's petition at the commencement of the proceedings.

If the surrogate decide that a sufficient sum for the payment of the debts can be raised by mortgage or lease, an order to that effect must be made and entered in his minutes. Such order should recite concisely, but distinctly, in detail, the previous proceedings in the matter and the observance of all the requirements of the statute, and should set forth the giving of the proper bond, conditioned for the faithful application of the moneys arising from such mortgage or lease, according to the provisions of the statute presently to be quoted. It should state that the surrogate has been satisfied, upon due examination, as to the matters specified in the 14th section, above quoted, of the Revised Statutes, and in the 41st section of the law of 1837, and that it has appeared that the requisite moneys can be raised by a mortgage or lease of the lands, as the case may be, and should direct the execution of the proper instrument for the purpose. (For form of the order, see Appendix, No. 83.)

The money raised by a mortgage or lease of the real estate is received and retained by the executor or administrator, or by the person ap-

^(u) 2 R. S. 102; 4th ed. 287.

^(v) *Ib.*

pointed in his place, pursuant to the provisions of the statute presently to be quoted. And the executor or administrator, or such person, applies the money to the payment of the debts of the deceased, and is liable to account for the same before the surrogate under another provision of the statute, which also will presently be quoted.

Of the Order for Sale.

By the 18th section of the above mentioned title of the Revised Statutes, if it shall appear to the surrogate that the moneys required cannot be raised by mortgage or lease, advantageously to the estate, he shall, from time to time, order a sale of so much of the real estate, whereof the testator or intestate died seised, as shall be sufficient to pay the debts which the surrogate shall have entered in his books, as valid and subsisting.(w)

By section 19, if such real estate consist of houses or lots, or of a farm so situated that a part thereof cannot be sold without manifest prejudice to the heirs or devisees, then the whole or a part thereof, although more than may be necessary to pay such debts, may be ordered to be sold; and if a sale of the whole real estate shall appear necessary to pay such debts, it may be ordered accordingly.

By section 20, the order shall specify the lands to be sold, and the surrogate may therein direct the order in which several tracts, lots or pieces shall be sold. If it appear that any part of such real estate has been devised, and not charged in such devise with the payment of debts, the surrogate shall order that the part descended to heirs be sold before that so devised; and if it appear that any lands devised or descended have been sold by the heirs or devisees, then the lands remaining in their hands unsold, shall be ordered to be first sold; and in no case shall land devised, expressly charged with the payment of debts, be sold under any order of a surrogate.

After hearing the parties and passing upon the debts claimed, the surrogate, if satisfied that all the provisions of the statute have been complied with, may, from time to time, order a sale of so much of the real estate as shall be necessary to pay the debts; and if the first sale ordered has fallen through, or has produced an insufficient amount, he may make other orders, from time to time, till all the debts are paid, and all the real estate necessary for that purpose is exhausted.(x)

If the administrator make a voluntary application for the sale of the real estate, all the parties be brought in, a hearing had, the debts proved, and an order of sale made, the administrator cannot, at his option, discontinue the proceeding, but the creditors may insist upon its further prosecution, and apply, as may be necessary, for reviving or speeding the proceedings.(x)

Where an heir has conveyed a part of the real estate descended to him, leaving the debts of the decedent unpaid, it seems the surrogate may direct the lands still belonging to the heir to be first sold for the

(w) 2 R. S. 103; 4th ed. 288.

(x) *Farrington v. King*, 1 Bradf. Surr. Rep. 182.

payment of such debts, so as to protect the equitable rights of the purchaser from such heir.(y)

The order for sale should contain recitals as to the previous proceedings,(z) the observance of the provisions of the statute, and the proof required by the 14th section of the Revised Statutes and the 41st section of the law of 1837, similar to those above directed for the order to mortgage or lease,(a) and should also set forth that it had been made to appear to the surrogate, that the moneys required could not be raised by mortgage or lease advantageously to the estate, and the giving of the proper bond for the payment or delivery to the surrogate of the proceeds of the sale, pursuant to the provisions of the statute presently to be stated. It should specify the lands to be sold, and include the necessary directions as to the sale of a part or the whole of the real estate of the decedent, and as to the order in which the different portions shall be sold, prescribed by the above quoted 19th and 20th sections of the statute. It may also direct the credit to be given on the sale, pursuant to the 28th section of the statute hereafter to be quoted. If the creditors wish to have the property sold on credit, the most proper course is to suggest it to the surrogate, at the time of making the order, so that he may inquire into the situation of the property, and the claims of the various creditors, and give the proper directions.(b) And it is submitted, that a day may properly be appointed by the order with reference to the time requisite for making the sale, on which the executor or administrator shall bring in his report of the sale, to be examined by the surrogate and confirmed or vacated by him, pursuant to a subsequent provision of the statute, which will presently appear, and that the matter should be adjourned to that day, so that the parties in interest may be present if they choose at such examination. (For form of the order, see Appendix, No. 85.)

Of the Security to be given by an Executor or Administrator, or a person appointed in his place, on obtaining an Order to Mortgage, Lease or Sell.

The following sections of the statute provide for security to be taken of the executor or administrator by the surrogate, before granting an order for the mortgaging or leasing, or for the sale of the real estate, and also for the appointment of a proper person to execute the mortgage or lease, or to make the sale, in case the executor or administrator neglect or refuse to give the required security, and for taking security of such person.

Sec. 21. Before granting any order for the mortgaging or leasing any real estate, the surrogate shall require from the executor or administrator applying for the same, a bond to the people of this state, with sufficient sureties, to be approved by the surrogate, in a penalty double

(y) *Eddy v. Traver*, 6 Paige, 521.

(z) In *Atkins v. Kinnan*, (20 Wen. 251,) Cowen, J., says, "The recital of the previous proceedings was also very well; and in practice, we believe, usually makes a part of the order of sale."

(a) For a discussion as to the recitals which should be made in the order for sale, see the above mentioned opinion of the surrogate, in the "*Matter of the real estate of Isaac Lawrence*." *Law of Surrogates*, (1st ed.,) Appendix, p. xii.

(b) *Maples v. Howe*, 3 Barb. Ch. Rep. 611.

the amount to be raised by such mortgage or lease, conditioned for the faithful application of the moneys arising from such mortgage or lease to the payment of the debts established before the surrogate, on granting the order, and for the accounting for such moneys, whenever required by such surrogate, or by any court of competent authority.(c)

Sec. 22. Before granting any order for the sale of any real estate, the surrogate shall require a bond in like manner, and with sureties as above directed, in a penalty double the value of the real estate ordered to be sold, conditioned that such executors or administrators will pay all the moneys arising from such sale, after deducting the expenses thereof, and will deliver all securities taken by them on such sale, to the surrogate, within twenty days after the same shall have been received and taken by them.(d)

Sec. 23. In case of the refusal or neglect of the executors or administrators, applying for such order, to execute, within a reasonable time, any bond required by the two last sections, the surrogate shall appoint a disinterested freeholder to execute such mortgage or lease, or to make such sales, who shall execute a bond similar in all respects to that required of the executors or administrators, in whose place he shall be appointed; and in making such appointment, he shall give preference to any person who shall have been nominated by the creditors of the deceased.

Sec. 24. Upon executing and filing with the surrogate such bond, the surrogate shall order the mortgage, lease or sale to be made by the person so appointed, who shall possess all the power and authority by this title conferred on executors and administrators, in relation to the mortgaging, leasing, or sale of the real estate of the deceased, mentioned in the order of the surrogate, and shall, in like manner, be liable to account for his proceedings, and may, in the same manner, be compelled to satisfy debts, to pay over moneys, and to deliver securities.

(For forms of the bonds under these provisions, see Appendix, Nos. 82 and 84.)

In case the executor or administrator neglect or refuse to execute the required bond, and the creditors of the deceased agree upon a person to be nominated to execute the mortgage or lease, or to make the sale, they should state such agreement, and nominate such person to the surrogate, in writing.

An order for the appointment of the person should be made and entered in the surrogate's minutes.

Of the Notice of Sale.

By section 25, whenever a sale is ordered, notice of the time and place of holding the same should be posted for six weeks at three of the most public places in the town or ward where the sale shall be had, and shall be published in a newspaper, if there be one printed in the same county, and if there be none, then in the state paper, for six weeks successively; in which notice the lands and tenements to be

(c) 2 R. S. 103; 4th ed. 288.

(d) Ib. 104; 4th ed. 288.

sold shall be described with common certainty, by setting forth the number of the lots, and the name or number of the township or towns in which they are situated. If the premises cannot be so described, they shall be described in some other appropriate manner; and in all cases the improvements thereon, if any, shall be stated.(e)

These directions should be strictly followed, and the terms and conditions of the sale may also properly be included in the notice, although this is not expressly required by the statute.(f)

Regulations of the Sale.

Upon judicial sales of real estate, it is the duty of the officer conducting them, to sell the property in such parcels as will be best calculated to produce the highest aggregate price. A sale made by an administrator under the order of a surrogate is within this rule, and he may sell in subdivisions, although the order of sale describes the property as one parcel.(g)

By section 26, such sales shall be in the county where the premises are situated, at public vendue, between the hour of nine in the morning and the setting of the sun of the same day.(h)

By section 27, the executors or administrators making the sale, and the guardians of any minor heirs of the deceased, shall not, directly or indirectly, purchase or be interested in the purchase of any part of the real estate so sold. All sales made contrary to the provisions of this section shall be void; but this section shall not prohibit any such purchase by a guardian, for the benefit of his ward.(i)

By section 28, on such sales, the executors or administrators may give such length of credit, not exceeding three years, for not more than three-fourths of the purchase money, as shall seem best calculated to produce the highest price, and shall have been directed, or shall be approved, by the surrogate; and shall secure the moneys for which credit is given, by a bond of the purchaser, and by a mortgage on the premises sold.

Where the surrogate's order for the sale does not direct a sale upon credit, the administrator should sell for cash; unless all the creditors consent to a sale upon credit.(k)

Of Vacating or Confirming Sale.

The following sections of the statute provide for vacating, and also for confirming the sale.

Sec. 29. The executors or administrators shall immediately make a return of their proceedings, upon such order of sale, to the surrogate

(e) 2 R. S. 104; 4th ed. 289.

(f) See, "*In the Matter of the real estate of Isaac Lawrence, deceased*," Law of Surrogates, (1st ed.,) Appendix, xii.

(g) See *Delaplaine v. Lawrence*, 3 Coms. 301.

(h) 2 R. S. 104; 4th ed. 289.

(i) 2 R. S. 104; 4th ed. 289. The revisers accompanied their original report of this section with the following note: "The general principle, that a trustee shall not purchase the trust property, extended so as to make the purchase absolutely void." 3 R. & or. S. App. 647. See *Bostwick v. Atkins*, 3 Coms. 53; *Conger v. King*, 11 Barb. S. C. R. 356.

(k) *Maples v. Howe*, 3 Barb. Ch. Rep. 611.

granting the same, who shall examine the proceedings, and may also examine such executors or administrators, or any other person on oath, touching the same; and if he shall be of opinion that the proceedings were unfair, or that the sum bid is disproportionate to the value, and that a sum exceeding such bid, at least ten per cent., exclusive of the expenses of a new sale, may be obtained, he shall vacate such sale, and direct that another be had; of which notice shall be given, and the sale shall be in all respects conducted as the sale on the first order.(l)

Sec. 30. If it shall appear to the surrogate that such sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or, if disproportionate, that a greater sum as above specified cannot be obtained, he shall make an order confirming such sale, and directing conveyances to be executed.

(For form of the executor's or administrator's report of the sale, see Appendix, No. 86.)

When jurisdiction has been obtained of the subject matter, and of the parties in interest, and the surrogate has made an order for the sale of the property, it will be presumed that he had sufficient evidence of the facts necessary to be ascertained, before making such judicial determination. And after jurisdiction is obtained, errors or irregularities in its exercise cannot be impeached collaterally, but only on appeal.(m)

The statute gives no direction as to the notification of any person interested in the estate, or in the confirmation of the sale, to attend the surrogate upon the return of the proceedings by the executor or administrator. But it is evident that the Legislature contemplated that there might be litigation before the surrogate upon the question as to the propriety of a confirmation.(n) And if the proceeding has been duly adjourned by the order of sale, from the day of such order to the day of the coming in of the report of the sale, the heirs and devisees, and other parties then before the surrogate, will doubtless be held to have had sufficient notice of the proceedings for confirmation. Perhaps, in a proceeding of this kind before the surrogate, where the purchaser or any other party wishes to have notice, so as to enable him to attend and litigate the question as to the confirmation, he should file a *caveat*, and request that he may be summoned or notified of the time and place of hearing.(o)

Where the surrogate ordered the sale as to a part of the lots sold to be confirmed, and as to another part to be vacated, it was held that the purchaser of some of the lots as to which the sale was vacated, had such an interest in the confirmation of the sale of the lots bid off by himself at the sale, as to entitle him to appeal from that order: and such purchaser not having individually appeared before the surrogate on the return of the report of the sale, but the administrator, who had promised to endeavor to procure the confirmation of the sale, which he did endeavor to do in good faith, having appeared, it was held that

(l) 2 R. S. 105; 4th ed. 289.

(m) *Farrington v. King*, 1 Bradf. Surr. Rep. 182.

(n) *Delaplaine v. Lawrence*, 10 Paige, 604.

(o) 10 Paige, 604.

the appearance of the administrator in behalf of himself and the purchaser, was sufficient.(p)

On the hearing for the confirmation of the report, any of the parties in interest may object to the regularity or sufficiency of any of the proceedings of the executor or administrator, either in obtaining the order for the sale or on such sale.(q) It is competent for the surrogate, where different parcels have been sold, to confirm the sale in part and vacate it in part. And if, in his opinion, any one parcel was sold at a price disproportionate to its value, and will produce ten per cent. more on a resale, it is his duty to order a resale of that parcel, although the other parcels were sold for their full value.(r) If, however, it does not, in his opinion, appear that an advance of ten per cent. can be obtained, and the sale has been legally made and fairly conducted, the surrogate is imperatively required to confirm the sale.(rr) (For form of order confirming the sale and directing the execution of a conveyance, see Appendix, No. 87.) If one of the purchasers at the sale has assigned his purchase after the sale, but before a conveyance, an order must be obtained from the surrogate directing the conveyance to be made to the assignee.

Of the Conveyances of the Real Estate.

By sec. 31, such conveyances shall thereupon be executed to the purchaser, by the executors or administrators, or by the person so appointed by the surrogate to make the sale. They shall contain and set forth at large the original order authorizing a sale, and the order confirming the same, and directing the conveyances; and they shall be deemed to convey all the estate, right and interest in the premises of the testator or intestate, at the time of his death, free and discharged from all claim for dower of the widow of such testator or intestate.(s)

(For form of the deed of conveyance, see Appendix, No. 88.)

In a case(ss) under the statute, 1 R. L. by K. and R., 1801, p. 324, sec. 21, which requires that the sale shall be made and conveyances for the same executed by the executors, &c., applying for the order; "and the conveyances for the same shall set forth *such order at large*; and shall be valid, &c., against the heirs and devisees of such testator or intestate, and all claiming by, from or under them;" where one of the deeds recited simply that the surrogate had, by his order of such a date, directed such a parcel of fifty acres to be sold, describing it as in the order, and the other was still more defective, it was held, upon the ground of the defective recital, that the deeds were inoperative at law; and the court said, "where certain steps are authorized by statute, in derogation of the common law, by which the title of one is to be divested and transferred to another, every requisite having the semblance

(p) 10 Paige, 604.

(q) See surrogate's opinion, "*In the Matter of the real estate of Isaac Lawrence*," *Law of Surrogates*, (1st ed.,) Appendix, p. xii.

(r) *Delaplaine v. Lawrence*, 3 Coms. 301.

(rr) *Horton v. Horton*, 2 Bradf. Surr. Rep. 200.

(s) 2 R. S. 105; 4th ed. 290.

(ss) *Atkins v. Kinnan*, 20 Wen. 241.

of benefit to the former must be strictly complied with. The statute demanding the order at large, we cannot say it is complied with so long as the deed omits to recite the whole, as it stands upon record. We do not say it should be literally recited; but it is impossible to say that a document is set forth at large, unless every part is substantially presented. That, we think, is the least that the statute calls for. The conveyances from the executor were, therefore, void, and must continue so, unless they shall be rectified on a proper application to the Chancellor."

It seems that a surrogate has not the power to compel the purchaser of the real estate of the decedent, at a sale made by the executors or administrators under an order of such surrogate, to take the conveyance of the property, and to pay to the executors or administrators the purchase money bid upon the sale.(t)

By the 32d section of the above mentioned title of the Revised Statutes, every sale and conveyance made pursuant to the provisions of this title shall be subject to all charges by judgment, mortgage or otherwise, upon the lands so sold, existing at the time of the death of the testator or intestate.(u)

Of the Disposition of the Proceeds of the Sale.

By sec. 33, if the proceeds arising from the mortgage, lease or sale of any lands, made pursuant to the order of any surrogate, as herein directed, which shall have been paid over to such surrogate, shall be sufficient to pay all the debts established before the surrogate, on granting the order, the heirs and devisees of the testator or intestate, and all the remaining lands of which he died seised, shall be exonerated from all claim or charge by reason of such debts so established. If such proceeds shall not be sufficient for that purpose, the heirs and devisees, and the remaining land, shall be exonerated from such debts in proportion to the sum raised and paid over.

By sec. 34, the surrogate who shall grant any order for the mortgage, lease or sale of real estate, shall possess the same power to cite and compel any executor or administrator to account for the proceeds of the sale, mortgage or lease of any real estate, and to compel the payment of debts, and the payment of moneys arising from such sales, and the delivery of securities taken thereon, as if such real estate had been originally personal estate, in the hands of such executor or administrator.(v)

The directions given in a preceding portion of this work(w) for compelling the executor or administrator to account and to make payments, are to be followed in proceedings under this last provision.

By sec. 35, where the whole or any part of the real estate of any deceased person shall have been sold by virtue of an order of a surrogate, the moneys arising from such sale shall be brought into the office

(t) *Butler v. Emmett*, 8 Paige, 12.

(u) 2 R. S. 105; 4th ed. 290.

(v) Ib. 106; 4th ed. 291.

(w) *Ante*, ch. 12.

of the surrogate granting such order, for the purpose of distribution, and shall be by him retained for that purpose.(x)

Of the Payment of the Expenses of the Sale and the Satisfaction of the Widow's Dower.

The following sections of the statute provide for the payment of the expenses of the sale for the satisfaction of the dower of the widow out of the proceeds of the sale, for the distribution of the balance among the creditors of the deceased, and for the publication of notice of such distribution.

Sec. 36. The surrogate shall, in the first place, pay out of the said moneys the charges and expenses of the sale. He shall next satisfy any claim of dower which the widow of the testator or intestate may have upon the lands so sold, by the payment of such sum in gross as shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction for such claim, if the widow shall consent to accept such sum in lieu of her dower, by an instrument under seal duly acknowledged or proved, in the same manner as deeds entitled to be recorded.(y)

Sec. 37. If, after reasonable notice for that purpose, no such consent be given, then the surrogate shall set apart one-third of the purchase money to satisfy such claim, and shall cause the same to be invested in permanent securities, on annual interest, in his name of office, which interest shall be paid to such claimant during life.

Sec. 38. If, after the deductions aforesaid from the proceeds of such sale, there shall not be sufficient remaining to pay all the debts of the testator or intestate, then the balance of such proceeds shall be divided by the surrogate among the creditors, in proportion to their respective debts, without giving any preference to bonds or other specialties, or to any demands on account of any suit being brought thereon.

Sec. 39. Every person to whom the deceased shall have been indebted, on a valuable consideration, for any sum of money not due at the time of such distribution, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed, for the time unexpired of such credit.(z)

Sec. 40. Before any such distribution shall be made, notice of the time and place of making the same shall be published for six weeks successively, in a newspaper printed in the county where the surrogate resides. He may also publish such notice in such other newspaper as he may deem most likely to give notice to the creditors.

(For form of the notice to the widow respecting the satisfaction of her claim of dower under the 37th section, see Appendix, No. 89.)

These statutes relating to the sale of the real estate of deceased persons, under a surrogate's order for the payment of debts, do not authorize the sale of the widow's estate in dower, where dower *has been assigned* to her. Before assignment the widow has no estate in the lands

(x) 2 R. S. 106; 4th ed. 291

(y) *Ib.*

(z) 2 R. S. 107, 4th ed. 292.

of her husband. Until then her interest is a mere chose in action, or claim, which is extinguished by a sale under a surrogate's order. But after assignment the seisin of the heir is defeated *ab initio*, and the dowress is in of the seisin of her husband as of the time when that seisin was first acquired or held during the coverture.(a)

Where the widow's dower in the real estate of her deceased husband has been assigned to her previous to the application to the surrogate for a sale of the estate of the decedent, for the payment of his debts, the part assigned to the widow for dower should be sold subject to her life estate therein as tenant in dower. Thus where the real estate to be sold under a surrogate's order consisted of an entire farm in which the widow's dower had been assigned, it was considered that the same should be sold together in one parcel, subject to the widow's life estate, as tenant in dower, in the part of the premises which had been assigned to her for her dower.(aa)

The gross sum to be deemed a reasonable satisfaction of the widow's claim of dower, is estimated in similar proceedings in courts of equity, according to the present value of an annuity of six per cent. on the principal sum during the probable life of such widow, according to the Portsmouth or Northampton tables.(b) A table corresponding with the Northampton tables, for the purpose of such a calculation, together with an example of the mode of calculating the gross sum due to the widow, will be found in the Appendix, No. 90.

(For a form of the widow's release of dower in the lands sold, see Appendix, No. 91.)

Of the Notice of the Distribution of the Proceeds and of such Distribution.

An order for the publication of the notice of distribution in the newspapers should be made and entered in the surrogate's minutes. (For form of the order and notice, see Appendix, No. 92.)

By sec. 41, at the time and place appointed, and at such other times and places as the surrogate shall appoint for that purpose, he shall proceed to ascertain the valid and subsisting debts against the testator or intestate, and shall hear the allegations and proofs of the claimants of such debts, and of the executors, administrators, heirs, devisees or any other person interested in the estate of the deceased, or in the application of the proceeds of such sale.(bb)

By sec. 42, any debts which shall have been established by the surrogate, on the application for the sale, shall not again be controverted, unless upon the discovery of some new evidence to impeach the same, and then only, upon due notice given to the claimant. Any other debts or demands which shall be presented, and which were not so established, shall be proved to the satisfaction of the surrogate, and the same proceedings may be had to ascertain the same, as are hereinbefore prescribed upon the hearing, on the application of any executor or administrator, for authority to sell the real estate.

(a) *Lawrence v. Miller*, 2 Coms. 245.

(aa) *Maples v. Howe*, 3 Barb. Ch. Rep. 611.

(b) Rules of Supreme Court, R. 75.

(bb) 2 R. S. 107; 4th ed. 292.

The proceedings, on ascertaining and settling the claims entitled to share in the distribution, will be similar in all respects to the proceedings described at a preceding page of the present subject, on the allowance of the claims against the estate on the return of the order to show cause; and the claims must be established according to the principles there laid down. An entry of the distribution is made in the surrogate's minutes. (For form, see Appendix, No. 93.)

A judgment creditor of the deceased, or a mortgagee, it seems, is not entitled to come in and prove his debt before the surrogate, for the purpose of obtaining a distributive share of the proceeds of the real estate, upon which his judgment or mortgage was a lien or incumbrance. "The thirty-second section of the title of the Revised Statutes, under which the proceedings were instituted," says the Chancellor, in *Buller v. Emmet and others*,^(c) "declares in express terms, that every sale and conveyance made pursuant to the provisions of that title, shall be subject to all charges by judgment, mortgage, or otherwise, upon the lands so sold, existing at the time of the death of the testator or intestate. And it seems to follow, as a necessary consequence, that the mortgagee or judgment creditor is not entitled to any part of the avails of the estate thus sold, to satisfy the incumbrance, which still remains upon the land in the hands of the purchaser. Where the whole real estate to which the incumbrance extends is sold, there perhaps may be an arrangement made between the personal representative of the decedent and the bidders at the sale under the surrogate's order, that the incumbrance shall be paid off out of the amount of the bid; so as to give the purchaser a clear title. But in that case, the amount of the incumbrance to be paid must be ascertained and paid out of the purchase money by the seller; and the surplus only should be reported to the surrogate, and paid over to him, as the actual proceeds of the sale to be distributed among the creditors. Such an arrangement being a mere matter of convenience which the lien creditor has no right to insist upon, I do not see how he can, consistently with this section of the statute, either apply to the surrogate to compel a sale, or come in and prove his debt before the surrogate, for the purpose of having it paid out of the proceeds of the real estate on which it is a lien."

The remedy of the judgment creditor, to obtain satisfaction of his debt out of the proceeds of the real estate of the decedent, before the Code, was to revive his judgment by *scire facias*, and to sell the real estate upon execution: since the Code he must take proceedings under that statute.^(d) The remedy of the mortgagee is to sell the mortgaged premises under a foreclosure, and if the proceeds be not sufficient for the payment of his debt, then if the result has been ascertained at the time of the distribution of the proceeds of the sale of the real estate under the surrogate's order, he may come in for his proportionable share on such distribution.

And it is not always sufficient for the creditor to show that his judgment is not a lien on the lands sold to entitle him to a share in this distribution. If the creditor have other security on the other lands of

(c) 8 Paige, 12.

(d) *Ib.*

the testator, and not on those sold, the creditor must first exhaust his legal remedies on those lands.(e)

Upon an application to sell the real estate of the deceased for the payment of his debts, equitable as well as legal demands may, however, be proved and established against the estate. Such equitable claim being an equitable lien on a certain portion of the real estate, is not an express charge upon the property, and not being secured by mortgage or judgment, may be directed to be paid out of the proceeds of the real estate when sold under the order of the surrogate for the payment of the debts of the deceased.(ee) And it is competent on the sale of real estate, for the payment of the debts of the deceased, or on the distribution of the proceeds, to offer any equitable defence against the claims of a party alleging to be a creditor; and the heirs are not restricted to a legal defence.(f)

A claim for the mesne profits of lands occupied by the intestate may be allowed out of the proceeds of his real estate, sold for the payment of his debts.(ff)

The distinction as to legal and equitable assets, no longer prevails as to the proceeds of the sale of realty, but such proceeds, when the real estate is sold by order of the surrogate, are distributed in the same manner to creditors as the personal estate. The only effective remedy provided by statute for the specific application of the realty to the discharge of debts, is vested in the Surrogate's Court.(g)

Of the Disposition of the Surplus.

By the 43d section of the above mentioned title of the Revised Statutes, if after payment of debts and expenses, there be any overplus of the proceeds of the sale, the same shall be distributed among the heirs and devisees of the testator or intestate, or the persons claiming under them, in proportion to their respective rights in the premises sold.(gg)

By the 44th section, any securities which shall have been taken on the sale of any real estate, shall be delivered to the surrogate, and kept in his office. He shall collect the moneys due thereon from time to time, and shall distribute and apply the same among the creditors, whose debts were established before him, in the same proportion as herein directed, respecting the moneys arising on such sale.

By sec. 45, the securities taken by any surrogate on the investment of a principal sum at annual interest, to satisfy a dower claim, shall be kept in his office as part of his official papers, and be delivered to his successor, and it shall be the duty of the surrogate to collect such interest, and pay the same to the person entitled thereto.

(e) *In the Matter of the real estate of Stephen Price, deceased*, Law of Surrogates, Appendix, xx. For an able discussion as to the right of judgment creditors of the deceased to payments out of the proceeds of the sale of the real estate, in a case having some peculiar features, the reader is referred to the opinion of the late learned surrogate of the county of New York, Hon. Charles McVean, deceased, "*In the Matter of the real estate of Stephen Price, deceased*," referred to, to be found in the Appendix to the first edition of this work.

(ee) *Renwick v. Renwick*, 1 Bradf. Surr. Rep. 234.

(f) *Campbell v. Renwick*, 2 Bradf. Surr. Rep. 80.

(ff) 2 Bradf. 80.

(g) *Bloodgood v. Bruen*, 2 Bradf. Surr. Rep. 8.

(gg) 2 B. S. 107; 4th ed. 292. See *Sears v. Mack's Assignees*, 2 Bradf. Surr. Rep. 394.

By sec. 46, after the death of the person entitled to such interest, the principal sum so secured shall be collected, and after deducting the costs and charges of the surrogate, in the management, collection and distribution thereof, the residue shall be distributed among the creditors of the deceased, who shall have established their debts previous to the original investment of such principal sum, in the same manner and with the like effect as herein provided for the distribution of the proceeds of the sale of real estate.(h)

By sec. 47, if there be any surplus remaining after such distribution, it shall be divided among the heirs and devisees of the testator, or the heirs of the intestate, or the persons claiming under them, in proportion to their respective rights in the premises sold.

By an act of the Legislature of the year 1850, it is provided as follows:

Sec. 1. Whenever any portion of the surplus moneys brought into the surrogate's office as the proceeds of the sale of real estate, shall belong to a minor, or belong to any person who has a temporary interest in the said money, and the reversionary interest belongs to another person, the Surrogate's Court shall make such order for the investment thereof, and for the payment of the interest and of the principal thereof, as the Supreme Court is authorized or required by law to make in analogous cases.

Sec. 2. The investments that shall be made by virtue of this act shall be secured by mortgage upon unincumbered real estate within this state, which shall be worth at least double the amount of such investment exclusive of buildings thereon, in the name of office of the surrogate, and he shall keep the securities as he now is required by law to keep other securities belonging to his office, and the interest and principal shall be distributed by and under the direction of the surrogate, in conformity to the order under which the investment shall be made, and to the person or persons entitled thereto.(hh)

Of Proceedings by a Creditor to obtain an Order for the Mortgage, Lease or Sale of the Real Estate of a Deceased Person, for the Payment of his Debts.

The obtaining of the order of the surrogate to mortgage, lease or sell the real estate of the deceased for the payment of his debts, where the proceedings are taken by a creditor of the deceased, comes now to be treated of.

By the 72d section of the law of 1837,(i) as amended by the act of the 18th of April, 1843,(j) and further amended by the act of the 21st September, 1847,(k) if, after the rendering of and accounting by an executor or administrator to a surrogate, as is provided in chapter six, part second, title third of the Revised Statutes, it shall appear that there are not sufficient assets to pay the debts of the deceased, the surrogate upon

(h) 2 R. S. 108.

(hh) S. L. 1850, ch. 150; 2 R. S. (4th ed.) 293.

(i) S. L. 1837, 536; 2 R. S. (4th ed.) 293-4.

(j) S. L. 1843, 228; 2 R. S. (4th ed.) 293-4.

(k) S. L. 1847, (2d volume,) p. 417.

the application of any creditor, made at any time after the granting of letters testamentary or of administration, shall grant an order for such executor or administrator to show cause why he should not be required to mortgage, lease or sell the real estate of the deceased, for the payment of his debts; but he shall not assign for cause why he should not be ordered to sell real estate, that the time within which he is allowed to sell the same has expired; and where a judgment has been recovered or decree obtained against an executor or administrator, for any debt due from the deceased, and there are not sufficient assets in the hands of such executor or administrator to satisfy the same, the debt for which the judgment or decree was obtained, shall, notwithstanding the form of such judgment or decree, remain a debt against the estate of the deceased to the same extent as before, and to be established in the same manner as if no such judgment or decree had been obtained; provided that where such judgment or decree has been obtained upon a trial or hearing upon the merits, the same shall be *prima facie* evidence of such debt before the surrogate. (kk)

By this provision of the statute, a creditor, in order to enforce the payment of his debt out of the real estate of the deceased, in case the executor or administrator neglects or refuses to take proceedings, must compel the executor or administrator to render an account unless he voluntarily produces such account pursuant to the provisions and directions given in the last preceding chapter of this work. (l) And if it appear from such account, on the settlement thereof, that the personal property is insufficient for the payment of the debts of the deceased, the creditor may then have the real estate mortgaged, leased or sold for the payment of such debts.

The rendering of an account, by one of several administrators, is not enough to authorize an application to the surrogate, by a judgment creditor, for an order to sell the real estate of the intestate. The administrators are all bound to account; and it is the duty of the creditor to compel them all to account, before he has any right to call upon the heirs at law to pay a judgment recovered against the administrators. (ll)

A creditor who has assigned all his interest in a debt against his deceased debtor, to a third person, is not authorized to present a petition to the surrogate, to compel the executors or administrators of the decedent to sell the real estate, for the payment of such debt, where the personal property of the decedent is insufficient for that purpose; but the assignee of the debt, who is the real creditor, must institute the proceedings before the surrogate in his own name.

It seems that a judgment creditor of the decedent, or a mortgagee,

(kk) By the law of 1837, S. L. 1837, 537, sec. 74, the 48th section of the 4th title of the sixth chapter of the second part of the Revised Statutes is repealed, and this 72d section is enacted; but the latter is not declared to be in the place of the former. In the arrangement above adopted, the 49th section of the title of the Revised Statutes is made to follow the 72d section of the law of 1837, as amended, and its provisions are made to refer to the provisions of that section, and such was, beyond question, the intention of the Legislature; but there is no declaration in the law to that effect. Without such an arrangement of these sections, and such a reference, the 49th and the following three sections are unintelligible. The same arrangement is observed in the (3d) edition of the Revised Statutes.

(l) See note to *Ferguson v. Broome*, 1 Bradf. Surr. Rep. 23.

(ll) *Sanford v. Granger*, 12 Barb. S. C. R. 392.

cannot institute proceedings before the surrogate, to compel a sale of the real estate of the decedent, upon which such judgment is a lien, or such mortgage an incumbrance.^(m)

Upon an application to the surrogate by the plaintiff in a judgment recovered against administrators upon an indebtedness of their intestate, for an order to sell the real estate of the intestate for the payment of his debts, the applicant need not show anything, in the first instance, but the record of his judgment, in order to prove his debt, and the amount of it; but that will not prove that the heir or devisee is liable to pay the debt. To establish that liability, the creditor must prove the fact that there are not sufficient assets in the hands of the administrators to satisfy the same. Without such proof the judgment is no evidence of a debt against the heirs at law, and the costs awarded against the executor or administrator can, in no event, be a charge against the real estate in the hands of the heir.^(mm)

Voluntary proceedings by an executor or administrator to procure an order of the surrogate to mortgage, lease or sell the real estate of the deceased for the payment of his debts, are limited, as has been seen,⁽ⁿ⁾ to the period of three years after the granting of the letters testamentary or of administration. The real estate of which the testator or intestate died seised remains liable to be sold under an order of the surrogate for the payment of debts in case of a deficiency of personal assets, on the application of the executor or administrator for the period of three years after the granting of letters testamentary or of administration. And this liability attaches to lands, not only in the hands of the heirs or devisees, but in the hands of any subsequent purchaser. It is a kind of statutory lien running with the land during the three years.⁽ⁿⁿ⁾ A creditor, however, may at any time institute compulsory proceedings for the same purpose, and require the executor or administrator to show cause why he should not be ordered to sell the real estate, and the statute expressly prohibits him from assigning as cause "that the time within which he is allowed to sell the same has expired." But though the lapse of three years after the granting of letters is not a flat bar to a compulsory proceeding, yet it is discretionary with the surrogate, after a long delay in making the application, whether to order the sale or not. The proceeding must be instituted within a reasonable period, and a neglect to apply, for many years, without explanation, is good reason for rejecting the application.^(o)

Of the Petition of a Creditor for an Order to have the Real Estate of his deceased Debtor mortgaged, leased or sold for the Payment of his Debts.

The petition of the creditor to have the real estate of the deceased mortgaged, leased or sold for the payment of his debts, should state the

^(m) *Buller v. Emmett*, 8 Paige, 12.

^(mm) *Sanford v. Granger*, 12 Barb. S. C. R. 392.

⁽ⁿ⁾ *Anle*, p. 553.

⁽ⁿⁿ⁾ *Hyde v. Tanner*, 1 Barb. S. C. R. 75.

^(o) *Ferguson v. Broome*, 1 Bradf. Surr. Rep. 10, and cases cited.

foundation and particulars of his claim against the estate, and aver the insufficiency of the personal property for the payment of the debts. It will be remembered that the petition of the executor or administrator for authority to mortgage, lease or sell the real estate, is required to set forth the amount of personal property which has come to the hands of the executor or administrator, the application thereof, the debts outstanding against the testator or intestate, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seised, with the value of the respective portions or lots, and whether occupied or not, and if occupied, the names of the occupants, and the names and ages of the devisees, if any, and of the heirs of the deceased; and the petition is required to be verified by the oath of the party presenting the same. On a proceeding by a creditor, the amount of the personal property, the application thereof, and the debts outstanding, will have appeared by the account rendered by the executor or administrator. As the description of the real estate, and the names and ages of the devisees, if any, and of the heirs of the deceased, are of the same importance where the creditor makes the application, as where the application comes from the executor or administrator, and as there seem to be no other means provided for furnishing these particulars, except through the person applying for the mortgage, lease or sale, such description, and the names and ages of the devisees and heirs, ought to be embraced in the petition. The prayer of the petition should be for an order for the executor or administrator to show cause why he should not be required to mortgage, lease or sell the real estate of the deceased for the payment of his debts, and that such further proceedings may be had as may be necessary to have such real estate disposed of for such payment.

As the petition of the executor or administrator must be under oath, so that of a creditor should be also. (For form of the petition of a creditor, see Appendix, No. 94.)

Of the Appointment of Guardians for Minors interested, and the Order that the Executor or Administrator show Cause.

On filing the petition, proceedings for the appointment of a guardian for the minors interested in the estate, if any, must be taken, similar to those hereinbefore described, in the case of an application by an executor or administrator; and after the appointment of such guardian, the order for the executor or administrator to show cause why he should not be required to mortgage, lease or sell the real estate, is granted.

By the 49th section of the above mentioned title of the Revised Statutes, such order shall be served personally on the executor or administrator to whom it shall be directed, at least fourteen days before the day therein appointed for showing cause.^(oo) (For form of the order, see Appendix, No. 95.)

In *Richardson v. Judah*,^(p) the intestate was the owner of an undivided fourth part of certain lots of land; and after his decease, one of

^(oo) 2 R. S. 108; 4th ed. 294.

^(p) 2 Bradf Surr. Rep. 157.

the tenants in common instituted a suit in the New York Common Pleas for partition. The proceedings were regularly conducted to a decree, the premises sold, deeds given, and the proceeds of sale distributed among the parties. The personal estate having been insufficient to discharge the intestate's debts, a creditor applied for the sale of the real estate of which he died seised, for the payment of his debts, and the administrators were ordered to show cause why the application should not be granted. The administrators set up the sale in partition and distribution of the proceeds; and it was held, that the administrators, not representing either the heirs or the purchaser, it was not competent for them to raise the objection.

Of the Order that Parties in Interest show Cause.

By the 50th section of the statute, if no cause to the contrary be shown, the surrogate shall order notice of such application to be served and published, in the same manner as hereinbefore directed, on the application of an executor; and if, at the day appointed in such notice, the surrogate be satisfied of the matters specified in the fourteenth section above quoted of the above mentioned title, he may order such executor or administrator to mortgage, lease or sell so much of the real estate of which the testator or intestate died seised, as shall be sufficient for the payment of the debts established before him.

It is assumed that the phrase, "notice of such application," used in this section, is only another name for the order to show cause, which is the process prescribed by the above quoted 5th section of the title, to the provisions of which reference is here made. A notice of the application by that name is not directed in any preceding portion of the title; but by the 5th section, as has been seen, the surrogate, upon an application by an executor or administrator, is required to make an order, directing all persons interested in the estate to appear before him, to show cause why authority should not be given to the executor or administrator to mortgage, lease or sell so much of the real estate of their testator or intestate, as shall be necessary to pay the debts; and that is probably the process intended by the words "notice of such application," to be issued in the case of an application by a creditor. If, therefore, no cause against the petition be shown by the executor or administrator, an order is then to be made, directing all persons interested in the estate to appear and show cause. (For form of the order, see Appendix, No. 96.) A notice may, doubtless, be framed, and served and published, which shall answer the same purpose as the order.

If, on the return of the order requiring the administrators to show cause, it appears that all the personal estate has been applied to the payment of debts, and that there remain claims unpaid, for the satisfaction of which a sale of the real estate may be made, the surrogate is bound to issue the second order, requiring all persons *interested* in the estate to show cause against the application. On the return of this last order, the heirs, or parties claiming under them, may intervene and oppose the proceedings: and if, on the return of the order requiring the administrators to show cause, they allege that other persons besides the

heirs are interested, it is proper to direct the service of the second order on such parties, though the statute does not demand such service. (pp)

On the day appointed by the order, or in the notice for showing cause, similar proceedings are to be had, according to the statute, as on an application for authority made by an executor or administrator, hereinbefore described; (q) and if the surrogate be satisfied of the matters specified in the 14th section above quoted, he may order the executor or administrator to mortgage, lease or sell, as he shall adjudge expedient, so much of the real estate of the deceased as may be sufficient for the payment of the debts established before him. (For form of an order granted on the application of a creditor, see Appendix, No. 97.)

Of the Order that the Executor or Administrator Mortgage, Lease or Sell.

By section 51, upon such order being granted and served, the executor or administrator shall mortgage, lease or sell, as directed in such order, in the manner hereinbefore directed, upon his own application; the like bond shall be executed, the like notice shall be given, and the same proceedings had in all respects, as are herein prescribed on the application of an executor; and the proceeds shall be returned to the surrogate in the like cases, and distribution shall be made in the like manner. (qq)

By sec. 52, if an executor or administrator shall refuse or neglect to serve and publish the notices above required, or to do any other act necessary to authorize an order for the mortgage, leasing or sale of the real property of the deceased, the surrogate may appoint a disinterested freeholder to perform the duties herein enjoined upon such executor or administrator, who shall proceed therein in the same manner as herein directed, in respect to such executor or administrator.

The order to mortgage, lease or sell, must, by the 51st section, be served on the executor or administrator. In other particulars, similar proceedings are to be had, and similar forms are to be used, under these sections, as in the case of a mortgage, lease or sale, ordered on the application of an executor or administrator. (r)

(pp) *Richardson v. Judah*, 2 Bradf. Surr. Rep. 157.

(q) See *supra*, p. 558.

(qq) 2 R. S. 108; 4th ed. 294.

(r) Sec. 73. The heirs of any person who may be liable to any creditor of such person, in consequence of lands having descended to them, shall be prosecuted jointly, in a court of law or equity, and not separately, for any such liability. S. L. 1837, 537; 2 R. S. (4th ed.) 695.

Sec. 53. No suit shall be brought against the heirs or devisees of any real estate, in order to charge them with the debts of the testator or intestate, within three years from the time of granting letters testamentary or of administration upon the estate of their testator or intestate; and if, after the expiration of that time, such suit shall be brought, upon proof of an application having been made, before the expiration of that period, for an order of sale pursuant to the provisions of this title, such suit shall be stayed by the court in which it shall be pending, until the result of such application. And if an order for sale be granted thereupon, such suit shall not be any further prosecuted, unless the plaintiff will allege that lands have descended to the heirs, or been devised to the devisees, which were not included in any order of sale; in which case, a decree in such suit shall not charge, or in any way affect, any land so ordered to be sold; and the plaintiff, so proceeding in such suit, shall not be entitled to any share in the distribution of the moneys arising on the sale, mortgage or leasing, of any premises, pursuant to such application. 2 R. S. 109; 4th ed. 294.

Sec. 54. But if the plaintiff, in any such suit, shall elect to discontinue the same, after no-

Of Sales by Executors, of the Real Estate of their Testator, under a Devise or Power.

The following sections of the statutes regulate sales of the real estate of a testator, by the executors named in the will, under a devise or power to such executors, contained in the will, and provide for the distribution, under the direction of the surrogate, of the proceeds of such sales:

Sec. 55. Where any real estate, or any interest therein, is given or devised by any will legally executed, to the executors therein named, or any of them, to be sold by them or any of them; or where such estate is ordered, by any last will, to be sold by the executors; and any executor shall neglect or refuse to take upon him the execution of such will, then all sales made by the executor or executors, who shall take upon them the execution of such will, shall be equally valid as if the other executors had joined in such sale. (rr)

Sec. 43. Sales of real estate, made by executors in pursuance of an authority given by any last will, unless otherwise directed in such will, may be public or private, and on such terms as, in the opinion of the executor, shall be most advantageous to those interested therein. (s)

Sec. 75. The proceeds of a sale of real estate, made in pursuance of an authority given by any last will, may be brought into the office of the surrogate before whom such will was proved, for distribution; and the surrogate shall proceed to distribute the same in like manner, and upon like notice, as if such proceeds had been paid into his office in pursuance of an order of sale of real estate for the payment of debts. (ss)

Sec. 57. Where, by any last will, a sale of real estate shall be ordered to be made, either for the payment of debts or legacies, the surrogate in whose office such will was proved, shall have power to cite

tice of an application having been made to a surrogate, according to the provisions of this title, he shall be entitled to distribution as other creditors, on establishing his claim. Ib.

(rr) 2 R. S. 109; 4th ed. 294. See *Ogden v. Smith*, 2 Paige, 195.

Sec. 44. Every estate granted or devised to two or more persons, in their own right, shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate vested in executors or trustees, as such, shall be held by them in joint tenancy. 1 R. S. 727; 4th ed. (2d vol.) 135.

A devise to executors, *eo nomine*, to hold and manage real estate, until the coming of age of the youngest child of the testator, vests the estate in the executors; and it is not necessary to the perfecting of the estate in them, that they should take out letters testamentary. *Judson v. Gibbons*, 5 Wend. 224. And, generally, a probate of a will is not necessary to the execution of a power of sale of lands, contained in such will. *Doolittle v. Lewis*, 7 Johns. Ch. Rep. 48. See, also, *Dominick v. Michael*, 4 Sandf. Superior Court Rep. 374.

(s) S. L. 1837, 532; 2 R. S. (4th ed.) 295. The following is the provision of the statute, which was repealed by the 74th section of the law of 1837, (S. L. 1837, 536,) at the time this section was enacted.

Sec. 56. Sales of real estate, made by executors in pursuance of an authority given by any last will heretofore made, or hereafter to be made, unless otherwise directed in such will, may, except where the real estate is situated in the city and county of New York, be public or private, and on such terms as, in the opinion of the executor, shall be most advantageous to those interested therein. Such sales of real estate situated in the city and county of New York, shall be made after like notice, and be conducted in the same manner, as is prescribed in title four, chapter sixth, of the second part of the Revised Statutes, in relation to sales by order of any surrogate.

In a note to the new section in the (3d) edition of the Revised Statutes, it is stated to be substituted for the former 56th section.

(ss) S. L. 1837, 537; 2 R. S. (4th ed.) 295.

the executors, in such will named, to account for the proceeds of the sales, and to compel distribution thereof; and to make all necessary orders and decrees thereon, with the like power of enforcing them, as if the said proceeds had been originally personal property of the deceased in the hands of an administrator.(t)

Whenever a power is given, in a will, to sell lands, without expressly naming a donee of the power, and the proceeds of the sale are to go to pay debts or legacies, or to be distributed, the power vests in the executors, unless a contrary intent appears.(tt) And such power is well executed by a deed from one executor, who has qualified, the others not having qualified.(u) And the above 55th section of the statute, it seems, applies as well to discretionary as to peremptory powers of sale.(v)

Where, however, the power to sell, given to executors by the will, is special, it can be exercised only in the mode prescribed by the testator. Thus, where an executor was authorized to sell the real estate at public vendue, to pay off the legacies to the children of the testator, as they became of age, and he sold the property at private sale, to raise money for his own use, before the legacies became payable, the sale was held to be void.(w) And where a testator, by his will, gives no authority to his executors to sell his real estate, the executors cannot sell any portion thereof, either for the purposes of division or otherwise.(x)

The proceedings on compelling an executor to account for the proceeds of a sale of real estate, made by him under the will of the deceased, as was stated at a previous page,(y) will be governed in all respects by the provisions and directions contained in the last preceding chapter of this treatise, for compelling an executor to render an account of the personal property of his testator.

The statute authorizing executors to bring the proceeds of a sale of real estate under the provisions of a will, into the surrogate's office, for distribution, is only for the benefit or protection of the executor; and it does not require the executor to place such proceeds in the surrogate's hands, where the real estate is sold under a power contained in the will.(yy)

By the 58th section of the above mentioned title of the Revised Statutes, any executor or administrator, or other person, appointed as therein directed, who shall fraudulently sell any real estate of his testator or intestate, contrary to the foregoing provisions, shall forfeit double the value of the land sold, to be recovered by the person entitled to an estate of inheritance therein.(z)

By sec. 59, no offence, in relation to the giving of notice of sale, or the taking down or defacing such notice, shall affect the validity of such sale to any purchaser in good faith, without notice of the irregularity.

(t) 2 R. S. 109; 4th ed. 296. See *Carroll v. Carroll*, 11 Barb. S. C. R. 293.

(tt) *Meakings v. Cromwell*, 2 Sandf. Superior Ct. Rep. 512; *S. C.*, 1 Selden, 136.

(u) 1 Selden, 136.

(v) *Taylor v. Morris*, 1 Coms. 341.

(w) *Pendleton v. Fay*, 2 Paige, 202.

(x) *Craig v. Craig*, 3 Barb. Ch. Rep. 76.

(y) See ante, p.

(yy) *Holmes v. Cook*, 6 Barb. Ch. Rep. 426.

(z) 2 R. S. 110; 4th ed. 295.

By sec. 60, the several surrogates shall record, in books to be provided by them for that purpose, all orders and decrees by them made, upon any proceedings before them in relation to the sale of real estate, and shall file and preserve all papers, returns, vouchers and documents, connected with such proceedings.

Of the Sale of the Interest of the Deceased in a Contract for the Purchase of Land.

Where the deceased was possessed of a contract for the purchase of land, his interest in such land, and under such contract, may be sold, under an order of the surrogate, for the payment of his debts. An interest in a contract for the purchase of land is real estate, and descends to the heirs of the purchaser; and, as the administrator has no power over the land and real estate of the decedent, any further than the statute has given it to him, he has not any control over such contract for the purchase of real estate, which will authorize him to deliver the same to a judgment creditor, with a view of having it disposed of, and realizing money upon it.^(a) The provisions of the statute, directing and regulating the sales in such cases of contracts, remain to be stated.

By the 66th section of the above mentioned title of the Revised Statutes, if the deceased, at the time of his death, was possessed of a contract for the purchase of land, his interest in such land and under such contract, may be sold on the application of his executor or administrator, or of any creditor, in the same cases and in the same manner as if he had died seised of such land; and the same proceedings may be had for that purpose as are prescribed in this title in respect to lands of which he had died seised, except as hereinafter provided.^(b)

By the 67th section, such sale shall be made subject to all payments that may thereafter become due on such contract; and if there be any such payments thereafter to become due, such sale shall not be confirmed by the surrogate until the purchaser shall execute a bond to the executors or administrators of the deceased, for their benefit and indemnity, and for the benefit and indemnity of the persons entitled to the interest of the deceased in the lands so contracted for, in a penalty double the whole amount of payments thereafter to become due on such contract, with such sureties as the surrogate shall approve, conditioned, that such purchaser will make all payments for such land that shall become due after the date of such bond, and will fully and amply indemnify the executors or administrators of the deceased, as the case may be, and the persons so entitled, against all demands, costs, charges and expenses, by reason of any covenant or agreement contained in such contract, or by reason of any other obligation or liability of the deceased, on account of the purchase of such lands, and against all other covenants and agreements of the deceased, to the vendor of such land, in relation thereto.

By the 42d section of the law of 1837, the surrogate may order a sale pursuant to the sixty-sixth section of title four, chapter six of the

(a) *Griffith v. Beecher*, 10 Barb. S. C. Rep. 432.

(b) 2 R. S. 111.

second part of the Revised Statutes, as well where the deceased was the assignee of a contract for the purchase of land, as where he was the original purchaser. Such sales may be made subject to all payments due or to become due on the contract; and the bond required by the sixty-seventh section of the same title, shall, in such case, be conditioned for the payment of all moneys due or to become due on the contract. Such bond shall be required in all cases where the sale is made subject to payments due or to become due on the contract.(c)

By the 68th section of the above mentioned title of the Revised Statutes, if there be no payments thereafter to become due on account of such contract, no bond shall be required of the purchaser.(d)

By section 69, when such bond shall be executed, in the cases where it is required, and in all cases where the sale shall be confirmed, the surrogate shall direct the executors or administrators of the deceased to execute an assignment of such contract to the purchaser; which assignment shall vest in such purchaser, his heirs and assigns, all the right, interest and title of the persons entitled to the interest of the deceased in the lands sold at the time of sale, and such purchaser shall have the same rights and remedies against the vendor of such land as the deceased would have had if he had lived.

By section 70, if, in the judgment of the surrogate, a part of the land so contracted may be sold advantageously to the interest of the estate of the deceased, and so that the purchase moneys of such part will satisfy and discharge all the payments to be made for such land, according to the contract, he may order such part only to be sold; and, in that case, the purchaser shall not be required to execute any bond.(e)

By section 71, the moneys arising from any sale under the five last sections shall be paid to the surrogate, and shall be disposed of by him in the payment of the charges and expenses of such sale, and in satisfying any claim of dower which the widow of the deceased may have upon the lands so sold, in the manner hereinbefore provided, in respect to the sale of lands of which the deceased died seised.

By section 72, such claim of dower is declared to extend only to the annual interest, during the life of the widow, upon one-third of the surplus of the moneys arising from such sale, which shall remain after paying all sums of money due from the deceased, at the time of such sale, for the lands so contracted and sold.

By section 73, the surrogate shall apply the residue of the moneys arising from such sale, in the first instance, to the payment of all sums of money then due from the deceased to the vendor of the land so contracted on account of such contract, and shall then proceed to distribute the balance among the creditors of the deceased in the manner hereinbefore provided; and if there be any surplus, after payment of debts and expenses, the same shall be distributed among the persons who would have been entitled to the interest of the deceased in the lands sold if such sale had not been made, or the persons claiming under them, in proportion to their respective rights in the premises sold.

(c) S. L. 1837, 532; 2 R. S. (4th ed.) 296.

(d) 2 R. S. 111; 4th ed. 297.

(e) 2 R. S. 112; 4th ed. 297.

By section 74, where a portion only of the lands so contracted is sold, the executor or administrator shall execute a conveyance therefor to the purchaser, which shall transfer to him all the rights of the deceased to the portion so sold, and all rights which shall be acquired to such portion by the executor or administrator, or by the persons entitled to the interests of the deceased in the lands sold at the time of sale, on the perfecting of the title to such land, pursuant to the contract.^(ee)

By section 75, upon the payment being made, in full, on a contract for the purchase of land, a portion of which shall have been sold, according to the preceding provisions, the executors or administrators of the deceased shall have the same right to enforce the performance of the contract which the deceased would have had if he had lived; and any deed that shall be executed to them shall be in trust and for the benefit of the persons entitled to the interest of the deceased, subject to the dower of the widow, if there be any, except for such part of the land so conveyed as shall have been sold to a purchaser according to the preceding provisions; and as to such part, the said deed shall enure to the benefit of the purchaser.

The forms adapted to the sales of real estate where the deceased died seized in fee, can be easily applied to proceedings for the sale of contracts. A continuation of further precedents is, therefore, deemed unnecessary.

Sec. 1. Whenever an order has been or shall be made by a surrogate for the mortgage, lease or sale of the real estate of any deceased person, and the executor or administrator, or other person named therein shall die or be removed, or shall be otherwise disqualified from executing the same, while the same order remains unexecuted in whole or in part, the proceedings in relation thereto shall be in nowise affected by such death, removal or disqualification; and it shall be lawful for the surrogate of the county by whom said order was made, to authorize the administrator to whom letters of administration shall have been issued on the goods, chattels and credits unadministered of said deceased, with the will annexed or otherwise, or a disinterested freeholder, as in the case of an original order, to execute said order in the same manner and with the like effect as if the said order had been executed by the executor or administrator, or other person originally named therein; provided, that the administrator or other person so to be authorized shall, before receiving such authority, give the like security as would be required on the granting of an original order for the mortgage, lease or sale of any real estate.^(f)

Another act of the Legislature of the year 1850, enacts as follows, with respect to omissions and defects in proceedings under the Revised Statutes, for the mortgage, lease or sale of the real estate of deceased persons for the payment of their debts.

Sec. 1. Every sale heretofore made, or hereafter to be made, under any of the provisions of the fourth title of chapter six of the second

^(ee) 2 R. S. 112; 4th ed. 297.

^(f) Laws of 1850, ch. 162; 2 R. S. (4th ed.) 291.

part of the Revised Statutes, and of the acts amending the same, or in addition thereto, shall be deemed and held to be as valid and effectual as if made by order of a court having original general jurisdiction, and the title of any purchaser at any such sale made in good faith, shall not be impeached or invalidated by reason of any omission, error, defect or irregularity in the proceedings before the surrogate, or by any allegation of want of jurisdiction on the part of such surrogate; except in the manner and for the causes that the same could be impeached or invalidated, in case such sale had been made pursuant to the order of a court of original general jurisdiction.

Sec. 2. No such sale, under any of the provisions of the fourth title of chapter sixth of part second of the Revised Statutes, and of the acts amending the same, shall be invalidated, nor in anywise impeached, for any omission or defect in any petition of any executor or administrator under the provisions of said title and acts amending the same, provided such petition shall substantially show that an inventory has been filed, and that there are debts, or is a debt, which the personal estate is insufficient to discharge, and that recourse is necessary to the real estate (or some of it) whereof the decedent died seised.

Sec. 3. Nor shall any such sale be invalidated, nor in anywise impeached, by reason that any such petition was or shall be presented by less than the whole number of executors or of administrators; nor by reason that after the filing of any such petition, any bond required by law has been or shall be given by less than the whole number of the executors or administrators petitioning; nor by reason that any further proceeding, notice, sale, deed or return has been or shall be had or made by less than the whole number of executors or administrators petitioning; nor by reason of any irregularity in any matter or proceeding after the presenting of any petition, and the giving notice of the order to show cause why the authority or direction applied for should not be granted, and before the order confirming such sale; provided, that nothing in this act contained shall be construed to affect, in any manner, any suit or proceeding already commenced for the recovery of any lands or the proceeds thereof, sold under or by virtue of any order of a Surrogate's Court.

Sec. 4. This act shall not be construed as authorizing any surrogate, or officer performing the duties of the office of surrogate, to make any order for the sale of the real property of a deceased person, or to confirm any such sale, unless, upon a due examination, he shall be satisfied that the provisions of said title have been complied with as if this act had not been passed.(ff)

Of the Authority of an Administrator with the Will annexed over the Real Estate of the Deceased.

It has been a matter of question whether an administrator with the will annexed has authority to sell real estate under a power granted by the will to the executor. By section 22, 2 R. S. 72, as has heretofore appeared(g) in all cases where letters of administration with the

(ff) S. L. 1850, ch. 82; 2 R. S. (4th ed.) 290-91.

(g) *Ante*, p. 230.

will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators, with such will, shall have the rights and powers, and be subject to the same duties, as if they had been named executors in such will. In *Conklin v. Egerton's Administrator*,^(h) it was held by the Supreme Court, (Cowen, J.,) upon an elaborate discussion of the law on this subject, that, notwithstanding this provision, a power to an executor to sell and dispose of real estate granted by a will, and to divide the proceeds among devisees to whom the estate was given by a previous clause of the same will, cannot, after the death of the executor, be executed by an administrator *cum testamento annexo*. On a writ of error in the case,⁽ⁱ⁾ the Court of Errors affirmed the judgment of the Supreme Court, but on another ground, and declined to express an opinion upon the point thus decided. In *Dominick v. Michael*,^(j) however, the Superior Court of the city of New York, expressly determined that a power given by will to executors, to sell the real estate of the testator, if not executed by the executors during their lifetime, does not vest in, and cannot be executed by the administrator with the will annexed; that the common law powers of an administrator with the will annexed have not been altered by the Revised Statutes, so as to enable him to execute such a power; and that the Legislature, by the section of the Revised Statutes above recited, intended that an administrator with the will annexed, should succeed merely to the rights, powers and duties of the executors, in relation to the *personal estate*; not that he should exercise any power over the real estate.

In *Le Fort and others v. Delafield*,^(k) where the defendant, who was an administrator with the will annexed, according to the allegations of the bill, assumed to act as trustee of the real estate under the will, it was held, that, whether the defendant, being merely the administrator in the place of the executors, could rightfully claim to be trustee of the real estate or not; yet, the complainants were at liberty to consider him in possession as their trustee, instead of regarding him as a mere wrong doer or trespasser; and upon charges of neglecting his duty as trustee, such as were contained in the bill, that they had a right to ask for his removal and the appointment of a proper trustee in his place.

Where it was doubtful whether the administrator, with the will annexed, was authorized to execute a trust power given to a person who was also named in the will as executor, but who refused to accept the trust, the court appointed such administrator trustee, and directed him to execute the conveyance of the property, under the power in trust, both as administrator and as trustee.^(l)

Decisions upon Executors' or Administrators' Sales of Real Estate under Surrogate's Orders.

It is deemed proper in this place to cite some of the decisions which have been made respecting sales by executors and administrators of the

(h) 21 Wend. 430.

(i) *Egerton's Adm'r v. Conklin*, 25 Wend. 224.

(j) 4 Sandf. Sup. Ct. Rep. 374.

(k) 2 Edw. Ch. Rep. 32.

(l) *De Peyster v. Clendenning*, 9 Paige, 296.

real estate of deceased persons for the payment of their debts under the orders of surrogates.

The foregoing provisions of the statute relating to such sales, and also those prohibiting the bringing of suits against heirs or devisees for the debts of their ancestors or testators within three years from the time of granting letters testamentary or of administration upon their estates,^(m) were considered by Vice-Chancellor McCoun in *Mathews v. Mathews and others*,⁽ⁿ⁾ with reference to a partition or conveyances of such real estate made among or by the heirs of the deceased, and he came to the conclusion that the Legislature intended that whenever the power of the executor or administrator over the real estate of the decedent should be exercised, and a sale become necessary under the authority of the surrogate, to make it overreach and supersede any sale made or procured by the heir or devisee within the three years; and also considered such sales as not made in good faith while debts of the ancestor remained, and a possibility existed of a deficiency of personal assets.

A surrogate's order of sale of real estate for the payment of debts, cannot ordinarily be impeached, collaterally, even for fraud; if the surrogate obtains jurisdiction by the presentment of an account of the estate and debts of the deceased, his adjudication that the personal estate is insufficient for the payment of debts, followed by an order of sale, is conclusive in any collateral proceeding. Such adjudication is examinable only on appeal, or by a proceeding in the nature of an appeal.^(o)

Evidence of abuse of power by administrators is inadmissible to defeat the title of a purchaser under a surrogate's order.^(p)

Whether an administrator authorized by a surrogate to *mortgage lands* of the intestate, can legally include a *power of sale* in such mortgage, and whether a foreclosure under such power is valid, so as to bar a redemption of the premises, *quere*; but at all events, where the mortgage has been foreclosed under such power, and the mortgagee has entered into possession, an action of *ejectment* will not lie against him by the heirs of the intestate.^(q)

If an executor or administrator pay debts in the course of his administration beyond the amount of assets which come to his hands, he shall have a right to be reimbursed, on the sale of the real estate.^(r)

To give validity to a deed of lands, executed under a sale by virtue of a surrogate's order, it must be affirmatively shown that an account of the personal estate, and of the debts of the testator or intestate, was presented to the surrogate. It is not enough that the presentment of such account, and the adjudication of the surrogate thereon, are recited in the order of sale, even though the surrogate testifies that he has no doubt that all the proceedings thus recited were actually had.^(s)

On a question as to the validity of a sale of real estate under a

(m) *Supra*, p. 581, note.

(n) 1 Edw. Ch. Rep. 565.

(o) *Atkins v. Kinnan*, 20 Wend. 241.

(p) *Jackson v. Irwin*, 10 Wend. 441.

(q) *Fuz v. Lipe*, 24 Wend. 164.

(r) 3 Johns. Ch. Rep. 316; Kirt. Surr. 336. See, also, *Collinson v. Owens, et al.*; 6 Gill and Johns. 4.

(s) *Ford v. Walsworth*, 15 Wend. 449.

surrogate's order, there may be a resort to *secondary evidence* to show the presentment of *an account of the personal estate of the deceased*, and of an estimate of his debts previous to the making of an order to show cause, if the documents cannot, on due search, be found in the proper office.(t)

A sale under a surrogate's order of the real estate of an intestate is void, unless an order of confirmation is obtained previous to the conveyance to the purchaser; so held in *Rea v. McEachron*,(u) although it was offered to be proved that the sale was *bona fide*, that a full and fair price was paid by the purchaser, and that the proceeds were applied to the payment of the debts of the intestate.

Where, upon an application to confirm a sale of real estate, made under an irregular order of a surrogate, it appeared that at the time the order for sale was made, there was personal estate in the hands of the administratrix more than sufficient to pay all the debts of the intestate, and there was no evidence that any part of the personal estate, or of the proceeds of the sale of the real estate, ever came to the hands of the heirs at law; it was held, that the assignee of the purchaser was not entitled to an order confirming the sale, although the latter purchased the estate at the sale in good faith, without notice of the fraud committed by the administratrix.(v)

The application to the Chancellor, under the statute, to confirm a sale under an irregular and illegal order of a surrogate, proceeds upon the ground that the sale was unauthorized, and that the legal title remains in the heirs at law; and where the equities of the parties are equal, they will be left to their legal rights.(w)

An administrator who is applying to a surrogate for leave to sell real estate in order to pay debts, will be restrained by perpetual injunction, where a decree for foreclosure and sale of the same premises has been had in the Court of Chancery, and is in force. And if there be a surplus of the proceeds of the sale remaining after the payment of the mortgage debt, the equitable rights of the creditors will be permitted to attach at once to such proceeds, instead of the lands, and the money will be applied in the same equitable manner, under the direction of the Court of Chancery, as it would be applied by the surrogate, provided the lands were sold under his authority.(x)

A contract by an administratrix, to convey lands of her intestate, when a surrogate's order for that purpose shall be obtained, does not vest an interest, though an order be afterwards obtained. Such a contract is void, and incapable of being enforced either at law or in equity, both because the administratrix has no interest, and as being contrary to the policy of the act authorizing administrators to sell the real estate of their intestate. An administrator has no interest in, or control over the real estate of his intestate; and though, after a contract to sell land when a surrogate's order shall be obtained for that purpose, an

(t) *Ib.*

(u) 13 Wen. 465.

(v) *In the Matter of Hemiup*, 3 Paige, 305.

(w) 3 Paige, 315.

(x) *Brevoort v. McJimsey*, 1 Edw. Chan. Rep. 551.

order be actually obtained, the administrator takes no beneficial interest which can enure to make the contract binding, even if it were not contrary to the policy of the law.(y)

CHAPTER XIV.

OF PROCEEDINGS FOR THE REVOCATION OF PROBATES, AND FOR THE REMOVAL OF EXECUTORS; FOR COMPELLING EXECUTORS TO GIVE SECURITY, AND ADMINISTRATORS TO GIVE NEW SURETIES, WHERE THOSE ALREADY PROVIDED ARE INSUFFICIENT, OR DESIRE TO BE RELEASED.

It was seen, in a preceding portion of this work, in connection with the subject of the inventory,(a) that the surrogate may issue a revocation of the letters testamentary or of administration, granted to any executor or administrator, if he neglect or refuse, after summons, to return an inventory within the time and in the manner prescribed by law; and the proceedings and practice on such revocation were there described in detail. It was also seen(b) that the payment of legacies may be enforced by the surrogate, in the same manner as the return of the inventory; that obedience by an executor or administrator to a surrogate's order to render an account,(c) may be enforced in the manner directed to compel the return of an inventory; that in case of disobedience, the same proceedings may be had to attach the party so disobeying, and to discharge him; and that the like revocation of the letters granted to him may be made, in case of the party's absconding or concealing himself, so that the order cannot be personally served, or of his neglecting to render an account within thirty days after being committed; and that whenever an absent or non-resident executor or administrator shall have been duly cited to appear and account before the surrogate, and such executor or administrator shall, without showing reasonable cause, neglect or refuse to appear, in pursuance of said citation, the surrogate issuing such citation may, in his discretion, thereupon revoke the letters testamentary or letters of administration before granted to such executor or administrator.(d) The other cases in which the authority of an executor or administrator may be revoked, and the practice on such revocation, remain to be treated of.

Of Proceedings for the Revocation of the Probate of a Will on Allegations.

Proceedings for the revocation of the probate of a will, on allegations of any of the next of kin of the deceased against the validity of the will, or the competency of the proof thereof, thereby destroying the

(y) *Bridgewater v. Brookfield*, 3 Cowen, 299.

(a) *Ante*, pp. 255, 261.

(b) *Ante*, pp. 409, 419.

(c) *Ante*, p. 447.

(d) *Ante*, p. 447.

authority of the executor, come first in order under this head.(e) The following sections of the 1st title of the 6th chapter of the 2d part of the Revised Statutes provide for the investigation, and prescribe the proceedings to be had for the purpose of such revocation.

Sec. 30. Notwithstanding a will of personal property may have been admitted to probate, any of the next of kin to the testator may, at any time within one year after such probate, contest the same, or the validity of such will, in the manner herein provided.(f)

Sec. 31. For that purpose, such relative shall file in the office of the surrogate by whom the will was proved, his allegations, in writing, against the validity of such will, or against the competency of the proof thereof.

Sec. 32. Upon the filing of such allegations, the surrogate shall issue a citation to the executors who shall have taken upon them the execution of such will, or to the administrators with such will annexed, and to all the legatees named in such will, residing in this state, or to their guardians, if any of them be minors, or their personal representatives, if any of them be dead; requiring them to appear before him, on some day to be therein specified, not less than thirty, and not more than sixty days from the date thereof, at his office, to show cause why the probate of such will should not be revoked.

Sec. 33. After the service of the citation, such executor or administrator shall suspend all proceedings in relation to the estate of the testator, except the collection and recovery of moneys, and the payment of debts, until a decision shall be had on such allegations.(g)

Sec. 34. At the time appointed for showing cause, and at such other times thereafter as the surrogate may appoint, upon due proof being made of the personal service of such citation, upon every person named therein, at least fourteen days before the time appointed for showing cause, the surrogate shall proceed to hear the proofs of the parties. If any legatees named in the will so contested shall be minors, and have no guardians, he shall appoint guardians to take care of their interests in the controversy.

Sec. 35. If, upon hearing the proofs of the parties, the surrogate shall decide that such will is, for any reason, invalid, or that it is not sufficiently proved to have been the last will and testament of the testator, he shall annul and revoke the probate thereof; if otherwise, he shall confirm such probate. Appeals from such decisions may be made, in the manner, within the time, and with the effect prescribed by law.

Sec. 36. Upon any such hearing before the surrogate, the depositions of witnesses, taken on the first proof of the will, who may be dead, insane, or out of the state, may be received in evidence.

Sec. 37. Whenever any surrogate shall annul and revoke the probate

(e) Where there is an appeal from the decision of the surrogate, admitting the will to probate, and the circuit judge reverses the decision of the surrogate, upon a question of fact, and a feigned issue is made up and determined against the validity of the will, or against the competency of the proof thereof, by section 60, 2 R. S. 67, the surrogate annuls and revokes the record or probate of the will, if any shall have been made; but a revocation on this ground can more conveniently be considered in connection with the subject of appeals from the orders and decrees of surrogates.

(f) 2 R. S. 61 4th ed. 244.

(g) 2 R. S. 62; 4th ed. 244.

of any will of personal property, as herein provided, he shall enter such revocation in his records, and attest the same: and shall cause notice thereof to be immediately served on the executors therein named, or upon the administrators with such will annexed, and to be published for three weeks in a newspaper printed in his county, if there be one; the expense of which publication shall be taxed as a part of the costs of the proceedings.

Sec. 38. Upon such notice being served upon such executor or administrator, his powers and authority shall cease, and he shall account to the representatives of the deceased person, whose alleged will was contested, for all moneys and effects received; but such executor or administrator shall not be liable for any act done in good faith, previous to the service of the citation, nor for any act so done in the collection of moneys, or the payment of debts, after the service of the citation, and previous to the service of the notice of revocation.

Sec. 39. The surrogate's fees and expenses shall be paid by the party contesting the validity of the will, or the probate thereof, in case such will or probate be confirmed; and in case such probate be revoked, the party who shall have resisted such revocation, may be required by the surrogate to pay the costs and expenses of the proceedings either personally, or out of the property of the deceased. In all cases, such payment may be enforced by process of attachment.^(h)

These provisions call for few other comments than such as may be necessary intelligibly to refer the reader to the forms and precedents for the practice under them to be found in the Appendix.

It is to be observed that, by the 30th section, the right to contest the probate, or the validity of the will, is given to the next of kin only, and that, strictly, by the words of the section, the widow is excluded, she not being one of the next of kin to the testator. But the widow is clearly within the spirit and equity of these provisions, and would, beyond all doubt, be held entitled to take proceedings under them.

The allegations are not required to be under oath, nor is the party obliged to state in them anything more than his objections against the validity of the will or the competency of the proof thereof. But by the 32d section, the surrogate is to issue a citation to the executors of the will, or to the administrators with the will annexed, and to all the legatees named in the will, residing in this state, or to their guardians, if any of them be minors, or their personal representatives, if any of them be dead, requiring them to appear and show cause why the probate should not be revoked. The names of the executors of the will or of the administrators with the will annexed, will appear by the records in the surrogate's office, and in many cases the names of the legatees may be ascertained by an inspection of the record of the will, but even in respect to the names of the legatees, the surrogate may not always be able to obtain from the records the requisite information, as where the bequest is to certain persons whose names are not given, but who are designated by the terms "children," "issue," or otherwise, and in scarcely any case can he learn positively from sources in his office, whether the legatees are of full age, or minors, and if minors, whether

they have guardians, and the names of such guardians, or whether any of them has died, and if so, the names of his personal representatives, if any, or where the legatees, or such guardians, or such personal representatives reside. It is submitted, therefore, that a statement of these particulars should be included in or should accompany the allegations, to enable the surrogate to issue the citation correctly. (For forms of allegations, see Appendix, No. 98.)

On filing the allegations the citation issues. An order must be entered in the surrogate's minutes for issuing the same. (For forms of the order and of the citation, see Appendix, No. 99.)

At the time appointed for showing cause, there should be an inspection of the will and an examination as to the residence of the legatees, and as to the other facts respecting them specified in the 32d section, so that it may be ascertained whether the citation has been directed to and served upon all the persons named in that section. It will, perhaps, prove useful to have the appearances of the parties who attend on the return of the citation, and the defaults of those who fail to attend duly noted and entered. If any of the legatees are minors, having no general guardians in this state, proof should be taken of the due service of the citation upon them, and a special guardian should be appointed. If any of the infant legatees have a general guardian appointed by the will in question, the practice is to serve the citation on both the infant and such guardian, and on the return of the citation the surrogate will decide as to the appointment of a guardian *ad litem*. The practice heretofore prescribed for bringing minors into court, on the settlement of an account of an executor or administrator,⁽ⁱ⁾ may safely be used in the present proceeding. The directions there given and the forms there referred to may easily be applied and adapted to this case.

The proof of the service of the citation required by the 34th section will be by affidavit; and, on such proof being furnished, and after the appointment of guardians for the minors, if the same be necessary, the examination into the allegations, and the validity of the will, and the competency of the proof thereof, is entered upon. Upon the hearing on the allegations before the surrogate, it is not sufficient for the executors or legatees, in the first instance, in answer to the citation to "show cause why the probate of the will should not be revoked," to present the probate of the will as *prima facie* evidence of its validity. Though the probate is generally conclusive as to the validity of the will, it is of no force in a proceeding instituted directly to impeach the probate itself. If the allegations are sufficiently broad to question the validity of the will, and the competency of the proof, the executors or parties interested against the allegations must prove the will, *de novo*, by original proof; and none of the depositions taken on the first proof can be received in evidence, except in the precise cases pointed out by the above 36th section of the statute—where the witness is dead, insane, or out of the state.^(j) The party filing the allegations will probably not be permitted to bring testimony as to any other objections against the will, or the probate thereof, than those specified in the allegations.

(i) See *ante*, p. 469.

(j) *Collier v. Idley's Executors*, 1 Bradf. Surr. Rep. 94.

Under sec. 57, 2 R. S. 80, the testimony taken by the surrogate must be reduced to writing, and entered by him in a proper book, to be provided and preserved as part of the books of his office. It is commonly recorded in the book of current daily minutes.

If the surrogate decide, upon the evidence, that the will is for any reason invalid, or that it is not sufficiently proved, he annuls and revokes the probate thereof. Such revocation must, by the 37th section, be entered by the surrogate in his records, and attested by him, and notice thereof must be served and published as therein provided; and, by the 39th section, the party who shall have resisted such revocation may be required by the surrogate to pay the costs and expenses of the proceedings, either personally or out of the property of the deceased, and such payment may be enforced by process of attachment. (For form of the order of revocation, requiring, also, the payment of the fees and expenses, see Appendix, No. 100.)

If the surrogate decide that the allegations have not been sustained, and that the will is valid and sufficiently proved, he makes an order dismissing the allegations and confirming the probate, and directing the party who contested the validity of the will or the probate, to pay the fees and expenses of the proceedings. According to the 39th section, the order may require such payment, or, in default thereof, allow an attachment to issue against the party. (For form of the order, see Appendix, No. 101.)

In case the order provide for enforcing the payment of the fees and expenses, by attachment, upon proof of personal service of the order, and of the bill of fees and expenses and demand, and of default in payment, an attachment will issue. The proceedings on such attachment will be governed by the provisions of the Revised Statutes relating to attachments,^(k) heretofore particularly referred to in connection with the subjects of the jurisdiction and powers of surrogates, and of the inventory. (For forms of proof on which an attachment may issue, order for issuing attachment and attachment, see Appendix, No. 102.) Similar proceedings are to be had to enforce the payment of the costs and expenses of the proceedings in case the probate be revoked, if the surrogate direct the party resisting such revocation to pay the same, either personally or out of the estate, and allow an attachment to issue.^(l)

Of Proceedings for the Removal of an Executor who is legally incompetent, and to compel an Executor, whose Circumstances are so precarious as not to afford adequate Security for his due Administration of the Estate, to give Security, or to remove him for want of Security.

By the 18th section of the 2d title of the 6th chapter of the 2d part of the Revised Statutes, if, after letters testamentary shall have been granted to any person named as executor in any will, complaint shall be made to the surrogate of the county in which such letters were granted, by any person interested in the estate of the deceased, that the

(k) 2 R. S. 586. See *ante*, p. 27; S. L. 1837, 535; 2 R. S. 223; 4th ed. 421.

(l) With respect to the effect of an appeal from the surrogate's decision upon allegations, see *Mason v. Jones*, 2 Bradf. Surr. Rep. 181, 325.

person so appointed executor has become incompetent, by law, to serve as such, or that his circumstances are so precarious as not to afford adequate security for his due administration of the estate, or that he has removed, or is about to remove, from this state, the surrogate shall proceed to inquire into such complaint.^(m)

By sec. 19, such surrogate shall thereupon issue a citation to the person complained of, requiring him to appear before such surrogate, at a day and place therein to be specified, to show cause why he should not be superseded; which citation shall be personally served on the person to whom it may be directed, at least six days before the return thereof, if he be in the county; and, if he shall have absconded from such county, it may be served by leaving it at his place of residence.

By the 61st section of the act of 16th May, 1837, concerning the proof of wills, &c., whenever the surrogate shall issue a citation to any administrator, executor or guardian, requiring him to show cause why he should not be removed from office, the surrogate shall have power to enter an order, enjoining such executor, administrator or guardian, from further acting in the premises, until the matter in controversy shall be disposed of.⁽ⁿ⁾

By the 20th section of the above mentioned title of the Revised Statutes, upon due proof of the service of such citation, the surrogate shall proceed at the day appointed, or on such other day as he shall appoint, to hear the proofs and allegations of the parties; and, if it appear that the circumstances of the person so appointed are precarious, as aforesaid, or that such person has removed, or is about to remove, from this state, he shall require such person to give bond, with sureties, like those required by law of administrators, within a reasonable time, not exceeding five days.^(o)

By section 21, if such person neglect to give such bond, or if it appear that he is legally incompetent to serve as executor, the surrogate shall, by order, supersede the letters testamentary, so issued to such person, whose authority and rights as an executor shall thereupon cease; and, if there be no acting executor of such will, the surrogate shall grant letters of administration with the will annexed, of the assets of the deceased left unadministered, as provided in this title.

The complaint to the surrogate, under the above quoted 18th section, should be presented in writing, and should be in the shape of a petition, praying a citation under the succeeding 19th section. It is supposed that, by the words of the 18th section, the surrogate may issue the citation to the executor to show cause, upon a mere statement of a complaint against him, and leave the party to bring forward the particulars of his charges on the return day of the citation; and that the inquiry, referred to in the last clause of the section, is one which is to take place on the hearing of the matter, after the executor has been duly cited, and not on the issuing of the citation. The petition, however, should state such particulars, as to the situation and value of the estate of the decedent, and the pecuniary circumstances of the executor, as, *prima facie*, to render it probable that the estate of the

(m) 2 R. S. 72; 4th ed. 257.

(n) S. L. 1837, 535; 2 R. S. (4th ed.) 421. See *ante*, p. 23.

(o) 2 R. S. 72; 4th ed. 257.

testator will not be safe in the hands of the executor. The petition will not be sufficient when the petitioner only states therein, generally, in the language of the Revised Statutes, that, according to his information and belief, the circumstances of the executor are so precarious as not to afford adequate security for the due administration of the estate.(p) And, at any rate, if the party desire to have the executor enjoined, pursuant to the above quoted provision of the law of 1837, he should set forth fully, in his petition, the facts on which he founds his complaint against the executor, and should make out at least a *prima facie* case for his removal, or for requiring him to give security. The petition, in such case, should contain a prayer for the proper order enjoining the executor, and should also be under oath. (For form of the petition, see Appendix, No. 103.)

On filing the petition with the surrogate the citation issues. An order for issuing the same must be entered in the minutes. (For forms of the order and of the citation, see Appendix, No. 104.)

Before granting the order restraining the executor, if the same be asked for, the surrogate may require other evidence besides that furnished by the petition. Such evidence may be presented by the affidavits of persons acquainted with the circumstances of the case, substantiating the charges in the petition. If the petition and such evidence, if required, be deemed sufficient by the surrogate to authorize him to enjoin the executor, he will make an order accordingly. (For form of such order, see Appendix, No. 105.) The order must be served on the executor.

A copy of the petition should be served on the executor at the same time with the service of the citation, as otherwise the executor, on the return day of the citation, will be entitled to an adjournment to enable him to inform himself of the complaint on which the proceedings are founded.

On the return day of the citation, if the executor fail to appear, on proof of due service of the citation upon him, the matter will be heard *ex parte*, and the surrogate will make the proper order in the case upon the complaint and evidence furnished by the petitioner. The surrogate should give to the executor an opportunity to put in a sworn answer to the petition.(p) If both parties appear, issue may be joined as to the interests of the petitioner in the estate, or as to the competency of the executor, or the adequacy of his circumstances, as security for his due administration of the estate, or the fact of his removal or intention to remove from this state, and witnesses may be examined on either side as in other cases.

A very small interest, it is presumed, will be sufficient to sustain the proceedings on the part of the petitioner. Any person interested in the estate of a testator, may apply to the surrogate for an order, requiring the executor to show cause why he should not be superseded, on the ground that his circumstances are so precarious, as not to afford adequate security for the due administration of the estate. And an apparent interest, positively sworn to, will be sufficient to justify the order; and the validity of the claim of the petitioner will not be tried on such

(p) *Colegrove v. Horton*, 11 Paige, 261.

an application. A mere allegation of irresponsibility, however, is not enough to compel an executor to give security; if the allegation be denied the charges must be proved.(q)

Where the executor, on the return of the citation, answers the petition and denies the allegations therein, upon oath, the petitioner must produce proof to establish the truth of such allegations; and if he fail to do so, his petition should be dismissed. And the surrogate cannot require the executor to prove his responsibility, before any doubt is raised as to such responsibility, by proof introduced by the petitioner.(r)

With reference to compelling the executor to furnish security, the Chancellor, in *Mandeville, Executor, &c., v. Mandeville*,(s) which was an appeal by an executor from a decree of a surrogate ordering him to give security, has given the following comprehensive exposition of the provision of the statutes now under consideration, and laid down the rule to be observed in respect to requiring security of executors on the ground of the inadequacy of their circumstances. He says:

"I think the surrogate erred in this case, in supposing that the circumstances of the appellant were so precarious as not to afford adequate security for his due administration of the estate of the decedent, according to the true construction of the provision of the Revised Statutes under which this proceeding was instituted. (2 R. S. 72, sec. 18.) It certainly could not have been the intention of the Legislature to prohibit the granting of letters testamentary to any executors except such as are possessed of property of their own, to the full value of the estate which the testator has authorized and appointed them to administer; or that an executor should be superseded in his trust, or required to find security, whenever his property was reduced below that of the decedent. Such a construction of the statute would render it almost impossible for a man of a large property to select an executor who would be both able and willing to assume the execution of the trust. The obvious meaning of the statute is, that an executor may be required to give security whenever the surrogate is satisfied that his circumstances are such as to render it doubtful whether the property will be safe in his hands, to be disposed of, or administered, as directed by the will."

The statute is applicable to the case of an executor who has not sufficient property, exclusive of the contingent interest of his wife, in the proceeds of the real estate of the testator, to pay his debts.(t) In determining the question, whether or not the executor is in such precarious circumstances as to make it proper to require security, the proportion of the estate belonging to the executor by the provisions of the will, may be taken into consideration in estimating the executor's pecuniary means,—regard also being had to the extent of the claims existing against the estate.(u)

If the evidence in the case do not show an interest in the petitioner to entitle him to demand security of the executor, or that the executor is incompetent, or that his circumstances are precarious, or that he has

(q) *Cotterell v. Brock*, 1 Bradf. Surr. Rep. 148.

(r) *Colegrove v. Horton*, 11 Paige, 261.

(s) 8 Paige, 475.

(t) *Holmes v. Cook*, 2 Barb. Ch. Rep. 426.

(u) *Cotterell v. Brock*, 1 Bradf. Surr. Rep. 148.

removed or is about to remove from this state, the complaint will be dismissed, and the order of injunction vacated, and the petitioner should be ordered to pay the fees and expenses of the proceeding and the executor's costs. Such payment, if ordered, may be enforced by attachment.

If it be shown that the executor has become legally incompetent, according to the provisions of the section of the statute prescribing the qualifications of executors, hereinbefore given in connection with the subject of granting letters testamentary,^(v) then an order must be made by the surrogate, which must be entered in his minutes, superseding the letters testamentary issued to such executor. The surrogate cannot take a bond in such a case.

Where it appeared, before a surrogate, on an application by legatees for the removal of an executor, &c., that no inventory had been filed by him; that the executor was squandering the estate in useless litigation; that he had delivered over to his attorney all the money and mortgages of the estate, and was ignorant as to what mortgages belonged to the estate; that he could not read writing, or write good English; and that he had little or no property, was not in any steady or useful employment, kept no accounts, and had no knowledge of the condition or disposition of the trust property, except what was derived from his attorney; it was held that those facts were sufficient to justify the removal of the executor, on the ground of improvidence and incompetency.^(w) An executor who is a gambler may, doubtless, likewise be removed on the ground of improvidence,^(x) and for a stronger reason than that which denies him letters of administration—because, as executor, he does not give security.

If it appear that the circumstances of the executor are so precarious as not to afford adequate security for his due administration of the estate, or that he has removed or is about to remove from this state, then the order will be that the executor give bond with sureties, like those required by law of administrators, within a certain time, not exceeding five days. (For form of the order, see Appendix, No. 106.)

If the executor propose to comply with the order to give security, then the same proceedings are to be had to fix the penalty of the bond, and to ascertain the sufficiency of the sureties, as those heretofore described in these pages, on application for administration in cases of intestacy.^(y) The statute does not fix the amount of the security to be given by an executor who is irresponsible; except that it cannot be less than twice the value of the personal estate. But where the proceeds of real estate may come into the hands of an executor, by virtue of his trust, for the benefit of others, security in double the amount of such proceeds is not unreasonable, when the executor has become insolvent; unless the amount which is to come to his hands is very large. In that case, security to a limited amount beyond the fund to be administered, should be deemed sufficient.^(z)

(v) See *ante*, p. 196; 2 R. S. 69; 4th ed. 225, sec. 3.

(w) *Emerson v. Bowers*, 14 Barb. S. C. R. 658.

(x) *McMahon against Harrison*, 2 Selden, 443.

(y) See *ante*, pp. 223, 226.

(z) *Holmes v. Cook*, 2 Barb. Ch. Rep. 426, 429.

The statute directs that the bond shall be like those required by law from administrators. The bond, therefore, must be taken in the name of the people; and conditioned that the executor shall faithfully execute the trust reposed in him as such, and that he will obey all orders of the surrogate touching the administration of the estate committed to him. It is a bond for the benefit of every person interested in the estate of the testator, and not merely for the benefit of the distributees, upon whose application the surrogate directs security to be given. Indeed, if taken only in a sum sufficient to cover the interest of the petitioner, upon whose application the order for security was obtained, it will not afford him adequate protection. For the whole amount recovered against the sureties would have to be distributed among all those who had suffered by the executor's mal-administration of the funds.(zz)

If the executor neglect to give the proper bond within the time limited by the order, then a decree will be made by the surrogate superseding his letters testamentary. (For form of such decree, see Appendix, No. 107.) The fees and expenses of the proceedings and the petitioner's costs, will, in most cases, have to come out of the estate of the deceased. It is presumed that where the executor unduly resists the application to have him removed, or to compel him to give security, such fees and expenses and costs may be charged upon him personally.

Of Proceedings to Compel an Administrator whose Sureties are Insufficient to give further Sureties, or for want of such further Sureties, to remove him from his Trust.

By the 25th section of the law of 1837, when any person interested in the estate of the deceased, shall discover that the sureties of any administrator are becoming insolvent, that they have removed, or are about to remove from this state, or that for any other cause they are insufficient, such person may make application to the surrogate who granted the letters of administration for relief.(a)

By section 26, if the surrogate shall receive satisfactory evidence that the matter requires investigation, he shall issue a citation to such administrator, requiring him to appear before such surrogate, at a time and place to be therein specified, to show cause why he should not give further sureties, or be superseded in the administration; which citation shall be served personally on the administrator, at least six days before the return day thereof; or, if he shall have absconded, or cannot be found, it may be served by leaving a copy at his last place of residence.

The application for relief, under the 25th section, should be under oath, and should state fully the facts as to the insolvency of the sureties of the administrator, or as to their removal from this state, or as to any other supposed cause of their insufficiency, so as to furnish competent evidence to the surrogate that the matter requires investigation; and if such facts are not within the knowledge of the party, he should

(zz) *Holmes v. Cook*, 2 Barb. Ch. Rep. 426, 429.

(a) S. L. 1837, 529; 2 R. S. (4th ed.) 263.

accompany his petition with the affidavits of other persons acquainted with the circumstances. Unless there be proof of the necessity for the proceedings, the surrogate cannot issue the citation. The prayer of the petition will be for relief, pursuant to the statute; and if the party desire to have the administrator enjoined, pursuant to the 61st section above quoted of the law of 1837, he should include a prayer for an order so enjoining the administrator, in his petition. (For form of the petition, see Appendix, No. 108.)

If the surrogate be satisfied that the matter requires investigation, he issues the citation; and if an order enjoining the administrator is asked for, and the case is a proper one for such order, he allows the same. (For form of the order for issuing the citation, and form of the citation, see Appendix, No. 109.) The form of the order of injunction will be similar to that in the last preceding case. (See Appendix, No. 105.) The citation must be served according to the provisions of the 26th section above quoted.

By the 27th section, on the return of the citation, or at such other time as the surrogate shall appoint, he shall proceed to hear the proofs and allegations of the parties; and if it shall satisfactorily appear that the sureties are, for any cause, insufficient, the surrogate may make an order requiring such administrator to give further sureties, in the usual form, within a reasonable time, not exceeding five days.^(b) (For form of the order requiring further sureties, see Appendix, No. 110.)

By the 28th section, if such administrator neglect to give further sureties, to the satisfaction of the surrogate, within the time prescribed, the surrogate shall, by order, revoke the letters of administration issued to such administrator, whose authority and rights as an administrator shall thereupon cease. (For form of the order revoking the letters of administration, see Appendix, No. 111.)

The reader will find the remarks above made, with reference to the payment of fees and costs, on proceedings to compel an executor to give security, or to remove him from his trust, applicable, to a certain extent, to proceedings under the sections which have now been considered.

Of Proceedings by a Surety of an Administrator, to be released from Responsibility for the future Acts or Defaults of the Administrator, and to compel such Administrator to give new Sureties, and, for want of new Sureties, to remove him from his Trust.

By the 29th section of the law of 1837, when either or all of the sureties of any administrator shall desire to be released from responsibility, on account of the future acts or defaults of such administrator, they may make application to the surrogate who granted letters of administration, for relief.^(c) (For form of the application under this provision, see Appendix, No. 112)

By the 30th section, the surrogate shall thereupon issue a citation to such administrator, requiring him to appear before such surrogate, at a

^(b) S. L. 1837, 529; 2 R. S. (4th ed.) 263.

^(c) S. L. 1837, 529; 2 R. S. (4th ed.) 263.

time and place to be therein specified, and give new sureties, in the usual form, for the faithful discharge of his duties; which citation shall be served in the manner prescribed by the 26th section of this act.(d)

(For form of the order for issuing the citation, and form of the citation under this provision, see Appendix, No. 113.)

By section 31, if such administrator shall give new sureties, to the satisfaction of the surrogate, the surrogate may thereupon make an order that the surety or sureties who applied for relief in the premises, shall not be liable on their bond for any subsequent act, default or misconduct of such administrator.(e)

(For form of the order releasing the sureties, see Appendix, No. 114.)

By section 32, if such administrator neglect to give new sureties to the satisfaction of the surrogate, on the return of the citation, or within such reasonable time as the surrogate shall allow, not exceeding five days, the surrogate shall, by order, revoke the letters of administration issued to such administrator, whose authority and rights as an administrator shall thereupon cease.(f)

(For forms of the orders under this section, see Appendix, No. 115.)

By section 33 of the law of 1837, in all cases in which letters of administration shall have been granted to more than one person, and the surrogate granting the same shall have revoked the same, in pursuance of the previous provisions of this act,(g) as to part only of such administrators, the person or persons whose letters have not been revoked, shall have the further administration of the respective estates subsequent to such revocation. Any suit brought previous to such revocation, may be continued the same as if no such revocation had taken place. In all other cases of revocation as aforesaid, the surrogate shall grant administration of the goods, chattels and credits not administered, in the manner prescribed by law.(h)

By section 34, whenever it shall appear to the surrogate that letters of administration or letters of guardianship have been granted on or by reason of false representations made by the person to whom the same were granted: and also whenever it shall appear that an administrator or guardian has become incompetent by law to act as such, by reason of drunkenness, improvidence or want of understanding, the surrogate shall have power to revoke such letters. And in case a woman marries after being appointed an executrix, administratrix or guardian, the surrogate, on the application of any person interested, shall have power to revoke such appointment.(i)

It would seem, that where letters of administration are granted on a mistake of facts, that this may be brought within the spirit of misrepresentation, by reason of which the surrogate could revoke them under this provision.(j)

Proceedings for the revocation of letters testamentary, or of administration, under this section, will be similar in all respects to those

(d) S. L. 1837, 529; 2 R. S. (4th ed.) 264.

(e) S. L. 1837, 530; 2 R. S. (4th ed.) 264.

(f) *Ib.*

(g) These are the provisions of the sections, numbered from 25 to 33, above given.

(h) S. L. 1837, 530; 2 R. S. (4th ed.) 264.

(i) S. L. 1837, 530; 2 R. S. (4th ed.) 264.

(j) *Perley v. Sands*, 3 Edw. Ch. Rep. 325.

above described for superseding the letters testamentary issued to an executor, on the ground of the incompetency of such executor, and the forms there referred to may easily be adapted to such proceedings.

By section 35, whenever it shall appear that the penalty of the bond taken from an executor, administrator or guardian, is inadequate in amount, the surrogate shall have power to make an order requiring him to give additional security for the faithful performance of his duty as such executor, administrator or guardian; and in case of non-compliance with such order, the surrogate may revoke the letters granted to him.^(k)

The proceedings to compel an executor or administrator to give additional security under this section, and in case of non-compliance to remove him from his trust, will be similar to those above described for compelling an administrator to give new sureties where his present sureties are insufficient, and similar forms may be used to those there referred to.

By section 68, art. 3, title 3, chap. 6, part 2, of the Revised Statutes, whenever the authority of an executor or administrator shall cease, or be revoked or superseded for any reason, he may be cited to account before a surrogate, at the instance of the person succeeding to the administration of the same estate, in like manner as hereinbefore provided for a creditor.^(l)

By section 69, in every such case the executor or administrator may cite the person succeeding to the administration of the same estate, to attend an account and settlement of his proceedings before the surrogate, by giving such reasonable notice as the surrogate shall direct, and by serving and publishing, in the manner hereinbefore provided, a citation to creditors and others; and such settlement and account shall have the like effect in all respects as in the case of a settlement at the instance of a creditor.

By the 36th section of the law of 1837,^(m) the surrogate shall have the same jurisdiction in requiring any administrator whose letters have been revoked as hereinbefore provided to render an account of his proceedings, as is conferred by the third article of title three, chapter six, of the second part of the Revised Statutes. The new administrator shall, within a reasonable time, or in case of his neglect, the other person mentioned in such article, may make application for such account; and such application may be made at any time after the revocation of the letters as aforesaid.

The proceedings for compelling an executor or administrator who has been removed to account, and for the settlement of his accounts, will be similar to those described in the previous chapter of this work, on the rendering and settling of the accounts of executors and administrators. The surrogate will usually direct the same number of days' notice of the settlement of the account to be given to the newly appointed executor or administrator, under the above quoted 69th section, as is required to be given to parties in interest residing in the county.

(k) S. L. 1837, 530; 2 R. S. (4th ed.) 264.

(l) 2 R. S. 95; 4th ed. 280.

(m) S. L. 1837, 531; 2 R. S. (4th ed.) p. 280.

Such direction may be included in the order for the issuing of the citation. With the exception of this particular, in all other respects the proceedings will be like those above referred to.

CHAPTER XV.

OF COSTS AND FEES IN THE SURROGATE'S COURT, AND OF THE LIABILITY OF EXECUTORS AND ADMINISTRATORS TO THE PAYMENT OF COSTS.

Of Costs and Fees in the Surrogates' Courts.

PREVIOUS to the Revised Statutes, it was not the practice of the Surrogates' Courts to give costs in favor of one party against another, in testamentary matters. Costs are given by the ecclesiastical courts in England, in such cases, both in original suits and on appeals; but it seems that such a practice was never adopted in this state.(a)

By the Revised Statutes, as has been seen at a previous page of this work, in connection with the subject of the powers and jurisdiction of surrogates,(b) in all cases of contest before a Surrogate's Court, such court may award costs to the party in the judgment of the court entitled thereto, to be paid either by the other party, personally, or out of the estate which shall be the subject of such controversy. Under this provision costs were allowed and taxed, at the rate fixed for similar services in the Court of Chancery, although such rate or any other was not prescribed by the statute.

By the 70th section of the act of the 16th May, 1837, "concerning the proof of wills," &c., as has also heretofore been seen, it was provided, that in all cases where the surrogate is authorized by law to award costs, he shall tax the costs at the same rate allowed for similar services in the courts of common pleas.(c) At the time of the passage of the last mentioned act, the provisions of the statute declaring the rate to be allowed for the services referred to in the courts of common pleas, could, without difficulty, be applied to the allowance of costs in the Surrogate's Court. Those provisions were repealed by the act "concerning costs," &c., passed 14th May, 1840,(d) and there are now scarcely any provisions of the statutes distinctly applicable to allowances for services in the courts of common pleas, similar to those rendered in the Surrogates' Courts, nor any otherwise fixing the rate of taxation of costs in the Surrogates' Courts.

At the present time, by the operation of the constitution and the Code, the Court of Chancery and the courts of common pleas are no longer in existence, and the costs of proceedings to judgment, except on appeals, are the same in all courts of record.(e)

(a) See 3 Paige, 185; 5 Cowen, 719; 1 Bradf. Surr. Rep. 37.

(b) *Ante*, p. 32.

(c) S. L. 1837, 536; 2 R. S. (4th ed.) 422; *Ante*, p. 32.

(d) S. L. 1840, 327, 336, sec. 40.

(e) Constitution, art. xiv; Code, title 10.

It has been determined, however, that costs are still to be taxed in the Surrogates' Courts at the same rates as were allowed for similar services in the courts of common pleas, in the year 1837.^(f)

In the Surrogates' Courts, there are not any stated terms. In a case of contest, attorneys' or proctors' fees can be taxed only as for a single trial, except for services in relation to motions or interlocutory proceedings. A charge for copies of the depositions, or minutes of the evidence taken by the attorney or proctor in the course of the trial, is not taxable.^(f)

It will be observed, that the provision above quoted from the Revised Statutes allows costs in the Surrogates' Courts "in all cases of contest." This is construed to prohibit such allowance in any other cases. The power to allow costs at all depends upon the statute, and is to be limited to the cases there specified. In the ordinary proceedings in the Surrogate's Court, there being no contest, no costs are allowable.

The surrogate awards costs upon the principles which govern courts of equity in similar cases. There has repeatedly been occasion, in discussing the various proceedings in the Surrogate's Court, treated of in this work, to point out cases in which it was considered that one or the other party, or the estate, should be charged with costs; and, in the precedents of orders to be found in the Appendix, provision will frequently be found for compelling payment of the costs of the controversy.

The surrogate is not authorized to decree the payment of costs out of the estate of the decedent, in the hands of his personal representatives, to the exclusion of their commissions for receiving and paying out moneys, if the amount in their hands is not sufficient to pay both. But if it is a proper case to charge them with the costs of the adverse party, upon the proceedings before the surrogate, there should be a decree against them, directly and personally, for the payment of such costs.^(g)

Nor is the surrogate, upon the settlement of the accounts of executors or administrators, before him, authorized to make an arbitrary allowance for services and counsel fees, to be paid by one party to the other, or to be paid out of the estate, without reference to the taxable costs allowed for similar services in other courts.^(g)

The general principle is, as was stated in a previous chapter, that executors are entitled to their costs, in settling their accounts, so far as they are not in fault; and bound to pay costs, as to such inquiries in the action as are caused by their breach of trust.^(h) And a creditor, calling an administrator to an account, cannot recover costs unless he obtains a dividend.^(hh)

It is stated, by authority, that by the policy of the law relating to Surrogates' Courts, the only mode of enforcing the payment of costs arising in their courts, (except in certain cases where bonds are di-

^(f) *Western v. Romaine*, 1 Bradf. Surr. Rep. 37.

^(g) *Halsey v. Van Amringe*, 6 Paige, 12.

^(h) *Ray v. Van Hook*, 9 How. Prac. Rep. 427. See, also, *Griffith v. Beecher*, 10 Barb. S. C. R. 432.

^(hh) 10 Barb. S. C. R. 432.

rected to be taken,) is by process of attachment.(i) Proceedings for compelling payment of costs, by attachment, were considered in the case of the revocation of the probate of a will, on allegations of next of kin,(j) and the rules there laid down, and the forms and precedents furnished, may easily be applied and adapted to other cases. The cases in which bonds for costs are given, whereby the payment of such costs may be enforced, are those of appeals from the decisions of surrogates, which remain to be treated of hereafter, when the subject of appeals comes to be considered.

It has been decided by the surrogate of the county of New York, and, on appeal, by the Chancellor, that the provisions of the statutes,(k) requiring non-resident plaintiffs to file security for costs, do not extend or apply to proceedings in the Surrogates' Courts.(l)

Fees of Surrogates.

The fees to which surrogates are entitled, for services done or performed by them, are prescribed by the statute, passed 7th May, 1844, which will be found at large in the Appendix to this volume. The surrogate is required, upon the written request of the person or persons liable to pay the same, to procure his bill for fees and charges, in any case to be taxed by the first judge of the county courts, or by some other officer authorized to tax bills of costs in the Supreme Court, residing in the county, upon due service of a copy of such bill and notice of taxation on the executor, administrator, or other person liable to pay the same, at least six days before such taxation; the expenses of which taxation must be paid by the person requiring the same.(m)

Of the Liability of Executors and Administrators for Costs in Suits in Courts other than the Surrogates' Courts.

The liability of executors and administrators for costs in suits in courts other than the Surrogate's Court, is now to be considered. With respect to such liability, in actions at law brought by executors or administrators, in which they failed, the statute formerly provided as follows:

Sec. 17. [Sec. 16.] In all actions and proceedings in which the plaintiff would be entitled to costs, upon a judgment rendered in his favor, if, after the appearance of the defendant, such plaintiff be non-suited, discontinue his suit, be *non-prossed*, or judgment pass against him on verdict, demurrer or otherwise; or, in case a plaintiff recovers judgment, but not a sufficient sum to entitle him to any costs, the defendant shall have judgment to recover against the plaintiff the full costs of the court in which the action shall be, which shall have the like effect as all other judgments.

Sec. 18. [Sec. 17.] But the last section shall not extend to give a de-

(i) Kirtland's Surrogate, 348.

(j) See *ante*, p. 595.

(k) 2 R. S. 620; 4th ed. 621.

(l) See *Westervell v. Gregg*, 1 Barb. Ch. Rep. 469.

(m) S. L. 1843, 262.

fendant costs against executors or administrators, necessarily prosecuting in the right of their testator or intestate, unless upon special application the court shall award costs against them for wantonly bringing any suit, or for unnecessarily suffering a non-suit or *non-pros*, or for bad faith in bringing or conducting the cause.⁽ⁿ⁾

The Code of Procedure, as amended in 1851 and 1852, abolished these provisions of the Revised Statutes, exonerating from costs persons who sue in a representative capacity, and placed such persons upon the same footing in this respect as other plaintiffs. The provisions in question of the Code regulate the liability of executors and administrators for costs, whether as plaintiffs or defendants. After specifying by the 304th section the cases in which costs shall be allowed of course to the plaintiff upon a recovery, the statute proceeds to provide :

Sec. 305. Costs shall be allowed of course to the defendant in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein.

A subsequent section provides as follows :

Sec. 317. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon or collected of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defence. But this section shall not be construed to allow costs against executors or administrators, where they are now exempted therefrom, by section forty-one of title three, chapter six of the second part of the Revised Statutes; and whenever any claim against a deceased person shall be referred pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements, to be taxed according to law. And the court may, in its discretion, in the cases mentioned in this section, require the plaintiff to give security for costs.

This section is not to be interpreted as giving costs against a plaintiff, only where the parties on both sides are in a representative character, as in a suit by an executor against a trustee, or the like. The language is disjunctive; it applies to a suit either by or against an executor, &c., without regard to the character of the adverse party. As to actions by or against persons in their own right, whether their suits were against executors, or they were sued by executors, the previous sections had, in like manner, defined their liabilities without reference to the character of their adverse parties. A plaintiff therefore, who sues an executor, on judgment being rendered against him, is, by this statute, liable for costs, either personally or to be paid by the estate, in all cases where one suing in his own right would pay costs.^(o)

In *Darby v. Condit*,^(p) the Superior Court of the city of New York, seem to have considered that the last clause of this section being the amendment of 1852, will not warrant the court in demanding secu-

(n) 2 R. S. 615.

(o) *Curtis' Executor, &c., v. Dutton*, 4 Sandf. Sup. Ct. Rep. 719.

(p) 1 Duer, 599.

rity of an executor or administrator, plaintiff, unless mismanagement or bad faith can be imputed to such plaintiff, and that security ought not to be required even when the estate is insolvent, unless it also appears that the plaintiff is insolvent. It may be, however, that it was the intention of the Legislature to protect a defendant as far as security for costs would go, as much against the unfounded claims of an insolvent estate, as against the mismanagement or bad faith of the plaintiff.

An executor or administrator whose proceedings are set aside on motion as irregular, will be ordered to pay the costs of the motion.(q) So, executors or administrators have always been held liable to costs upon interlocutory motions.(r)

It was formerly held to be irregular, in most cases, for a defendant to enter up a judgment for costs against an executor or administrator, plaintiff, without a special application to the court for such costs. An executor was liable for costs only where he prosecuted in bad faith, with full knowledge that he had no cause of action, or where the cause of action accrued wholly after the testator's death, and might have been prosecuted in his individual name.(s) And in such cases, a special application to enter such judgment must have been made to the court.(t) And, under the present statute, where it is proposed to hold the executor or administrator personally liable for mismanagement or bad faith, an application to the court for that purpose will be necessary.

Plaintiffs who live out of the jurisdiction of the court, may be compelled to give security for costs, though such plaintiffs sue as executors.(u)

With respect to the liability of executors and administrators to the payment of costs in actions at law against them:

In a preceding page of this work, in connection with the subject of the duties of the executor or administrator relative to the payment of the debts of the deceased,(v) it appeared that, by sec. 34, 2 R. S. 88, executors and administrators, after the expiration of six months from the granting of their letters testamentary or of administration, are to give notice to the creditors of the deceased requiring them to exhibit their claims, with the vouchers thereof, to such executor or administrator, at his residence or place of business; that, by the 35th section, the executor or administrator may require satisfactory vouchers not only, but also the affidavit of the claimant that such claim is justly due, that no payments have been made, and that there are no off-sets to his knowledge; that all this is not conclusive upon the executor or administrator; but, by the 36th section, if he doubt the justice of any claim, he may enter into an agreement to refer the same to referees, who are to be approved by the surrogate, and upon filing such agreement in the office of a clerk of the Supreme Court or a court of common pleas, a rule shall be entered referring the matters in controversy to such referees. That the 37th section directs that the referees shall

(q) *Varick v. Bodine*, 3 Hill, 444.

(r) Tidd, 979, 9th ed.

(s) *Ketchum v. Ketchum*, 4 Cowen, 87.

(t) *Palmer v. Palmer*, 5 Wen. 91.

(u) Wms. on Exrs. 1620, and cases cited.

(v) *Ante*, pp. 323, 347, chap. 10.

thereupon proceed in the same manner in all respects, shall have the same powers, receive the same compensation, and be subject to the same control as if the reference had been made in an action in which the court might direct a reference; that the court may set aside the report of the referees, or confirm the same, and adjudge costs as in actions against executors, and that the judgment of the court thereupon shall be valid and effectual in all respects as if the same had been rendered in a suit commenced by the ordinary process; that, by section 38, every claim presented to the executor and rejected by him, must be prosecuted within six months, if then due; if not, then within six months after some part or the whole shall become due, or the plaintiff cannot recover at all; that, by section 39, if a debt shall not be presented within the six months after the first publication of the executor's notice, the executor may pay debts of an inferior degree or legacies, without being chargeable in any suit brought for such debt, for such application of the assets in his hands; and that, by section 40, the plaintiff, in an action brought for a debt so not presented, shall recover only to the amount of such assets in the executor's hands at the commencement of his suit.

The next section provides as follows, having reference in the first clause thereof to the preceding 40th section.

Sec. 41. In such suit, no costs shall be recovered against the defendants; nor shall any costs be recovered in any suit at law against any executors or administrators, to be levied of their property or of the property of the deceased, unless it appear that the demand on which the action was founded was presented within the time aforesaid, and that its payment was unreasonably resisted or neglected, or that the defendant refused to refer the same pursuant to the preceding provisions; in which case the court may direct such costs to be levied of the property of the defendants, or of the deceased, as shall be just, having reference to the facts that appeared on the trial. If the action be brought in the Supreme Court, such facts shall be certified by the judge before whom the trial shall have been had.^(w)

This is the provision of the Revised Statutes exempting executors and administrators, defendants, from liability for costs referred to in the 317th section of the Code above recited. By sec. 38, [sec. 37,] 2 R. S. 618, in suits against executors and administrators, in which the plaintiff shall recover costs, the judgment shall be that such costs be collected of the assets of the deceased; unless, in the cases provided for in the third title of the sixth chapter of the second part of the Revised Statutes, the court shall award such costs to be paid by the executors or administrators.

Executors and administrators have been regarded with great favor and indulgence by the cases which have arisen and been decided under these provisions of the statute.

In *Potter v. Elz, et al., Administrators, &c.*,^(x) the declaration was on a promissory note given by the intestate, to which there was a plea of the general issue, with notice of special matter; and afterwards, before the circuit, the defendants gave a *relicta* and *cognovit*, and it was held

^(w) 2 R. S. 30; 4th ed. 275.

^(x) 5 Wend. 74.

that as no unreasonable resistance or neglect was chargeable upon the defendants, they were not liable for costs. And the court said that where there is a trial, the facts relied on to entitle the plaintiff to costs under the above 41st section, must be certified by the circuit judge as directed by the section; but in other cases of *cognovit* or default not provided for, the facts must be shown according to the ordinary practice of the court on a special application, by motion founded on affidavit. And that the party claiming costs against executors or administrators must show himself entitled, by proving that he presented his demand in due season, and that the defendants were guilty of a violation of their duty, either by unreasonably resisting or neglecting its payment, or by refusing to refer the same.

In *Nicholson v. Showerman, Administrator, &c.*,^(y) the action was on a promissory note given by the intestate, and there was a report of referees for the plaintiff. On a motion for costs against the administrator, the plaintiff showed, by the affidavit of the attorney, and the certificate of the referees, that it was proved on the hearing that payment of the note was demanded of the administrator within six months after it became due; that he answered that the estate of the intestate was not liable to pay the note, and that he would contest the same. On the hearing, the defendant denied the making of the note by the intestate, and endeavored to establish the defence that the consideration of the note had failed, in whole or in part, and that he had fully administered. The court considered that it was not shown that the demand of the plaintiff was unreasonably resisted or neglected. "The action," said Sutherland, J., "was defended upon the merits, and although the defence failed, it does not necessarily follow that it was improper to have made it; for aught that appears, the evidence in the case may have been nicely balanced."

In *Robert v. Dumas, Administratrix, &c.*,^(z) the claimant was a creditor of the intestate, and demanded a sum, as due to him, exceeding \$200. The matter in controversy was referred to three disinterested persons, in conformity to the above quoted provisions of the statutes. The referees, after hearing the parties, made a report in favor of the creditor or claimant for \$76 07. Within a few days after the making of the report, the administratrix tendered the amount so reported to the claimant, who refused to receive the same, unless the costs of the reference were also paid, which the administratrix refusing to pay, a rule for costs was asked of the court. The defendant was charged by the plaintiff with unreasonable resistance and neglect, and there was some controversy on this point. It was, however, conceded that the plaintiff presented his first account in the month of April, 1830, and the defendant her first account in May, 1830; the plaintiff's second account was delivered in September, 1831, the defendant's second account in November, 1831. The offer to refer was made and accepted in December, 1831. Subsequently to that time, there was no delay on the part of the defendant; and, when the report was made, payment was promptly offered, which was refused without the costs, and those the

(y) 6 Wend. 554.

(z) 7 Wend. 522.

defendant refused to pay. The plaintiff complained of neglect on the part of the defendant, because she or her agent did not seek the witness to whom the plaintiff referred them. The defendant's agent stated that he offered to allow all such charges as should be substantiated by affidavit. It also appeared that the plaintiff claimed upwards of \$200, and resisted a claim of \$100 for the services of the intestate. The referees allowed the defendant's charge, and must have disallowed some of the plaintiff's charges, as the report was only \$76. On the whole case, it was decided that the defendant was not chargeable with costs; and *Savage, Ch. J.*, said:

"The statute, I apprehend, cannot be construed to subject executors and administrators to costs, unless they are guilty of a violation of duty. If a creditor presents a claim, known to be a fair one, and there is property enough to pay it, not liable to pay debts of a higher class, it is the duty of the executor or administrator to pay it, and a refusal to pay, under such circumstances, I think, would be unreasonable; but if the executor or administrator doubts the correctness of the claim, the statute provides, that not only the vouchers may be required, but also the affidavit of the claimant. If the executor or administrator should still remain unsatisfied, he may resist; and if, upon the trial, it shall appear that he had good reason for such resistance, it can never be called unreasonable. If, for instance, the plaintiff should fail to substantiate his claim to the amount demanded, or the defendant should succeed in establishing a demand by way of off-set, which the plaintiff had refused to allow, such defendant could never be charged with unreasonable resistance." (a)

In *Winne v. Van Schaick, Administrator, &c.*, (b) the defendant, sued as an administrator, suffered a default, and the plaintiff taxed costs against him without obtaining an order of the court, entered judgment and issued an execution. The defendant moved to set aside the judgment and execution. The plaintiff read an affidavit, for the purpose of showing unreasonable delay in payment. But the court held, that executors and administrators are not liable to costs, unless it appear that the demand of the plaintiff had been unwarrantably resisted or neglected, or that the executor or administrator had refused to submit the matter to referees; and that such facts must be shown to the court before judgment for costs be signed, (c) and will not be listened to in opposition to a motion to set aside a judgment entered without leave, as the defendant has the right to be heard on such question; and set aside both the judgment and the execution.

In *Mulheran's Executors v. Gillespie*, (d) the doctrine is repeated, that judgment for costs cannot be entered of course, but must be specially moved for.

In *Swift v. Blair's Executrix*, (e) the motion for costs against the executrix was on an affidavit, stating that the defendant had refused to

(a) 7 Wend. 528-9. See, also, to the same effect, *Comstock agt. Olmstead*, 6 How. Prac. Rep. 77; *Cruikshank agt. Cruikshank*, 9 How. Prac. Rep. 350.

(b) 9 Wend. 448.

(c) 5 Ib. 74.

(d) 12 Ib. 349, 355.

(e) Id. 278.

arbitrate, &c. And the court said, "An executor or administrator is not bound to *arbitrate*; he can only be asked to *refer*, in the manner prescribed by the statute. This motion, therefore, must be denied. When it is sought to subject an executor or administrator to costs, inasmuch as they must come out of his own pocket, if granted—for it is only for neglect of duty that he can be subjected to costs—the party asking for the rule must bring himself strictly within the statute."

In *Foot & Bebee v. Gumaer's Executors*,^(f) it was held that the certificate of the circuit judge, under the above quoted 41st section, that the demand of the plaintiff had been unreasonably resisted by the executors, should state the fact, and need not state the evidence of the fact; and that, if the evidence did not warrant the certificate, application must be made to the court to set it aside.

In *Curhart v. Blaisdell's Executors*,^(g) the plaintiff claimed of the defendants between four and five hundred dollars. The defendants did not offer to pay anything. The cause was thereupon referred, pursuant to the above quoted 36th section; and the referees reported in favor of the plaintiff for \$180, which the defendants paid. The referees certified that "the demand of the plaintiff was unreasonably neglected and refused." On a motion for costs against the executors, it was considered that it was impossible to say that the payment of the plaintiff's demand was "unreasonably resisted or neglected," and the motion was denied; and with regard to the certificate of the referees, and the above mentioned decision, in *Foot v. Gumaer's Executors*, the court say, "But the referees have certified that 'the demand of the plaintiff was unreasonably neglected and refused;' and it is urged that this brings the case within the decision of the court in *Foot v. Gumaer's Executors*, 12 Wendell, 195. That case is not very fully reported, and it may be doubted whether the point on which the court intended to pass is stated with entire accuracy. The statute, sec. 41, declares that costs shall not be recovered against executors or administrators, except under particular circumstances: 'in which cases, the court may direct such costs to be levied of the property of the defendants, or of the deceased, as shall be just, *having reference to the facts that appeared on the trial*. If the action be brought in the Supreme Court, *such facts* shall be certified by the judge before whom the trial shall have been had.' This is not like the case where the circuit judge is to certify a single fact, as that the title to land came in question on the trial. There the certificate of the judge is conclusive on the question of costs, and the court will not, on a collateral motion, inquire whether it was properly granted or not. But the statute has imposed on this court the duty of deciding in what cases executors shall pay costs, 'having reference to the facts that appeared on the trial;' and, where tried at the circuit, 'such facts' are to be certified by the circuit judge. He need not state all the evidence, but he must state the facts on which this court is to form its judgment of the propriety of ordering costs. The statute does not provide for a certificate in a case where there has been a reference. But if this cause had been tried at the circuit, a certificate stating noth-

(f) 12 Wend. 195.

(g) 18 Wen. 531.

ing but the judge's conclusion from the facts proved, that the payment of the plaintiff's demand 'was unreasonably resisted or neglected,' would not entitle the party to costs. This court must decide whether the facts made out a case within the statute for awarding costs or not."

But in *Harvey v. Skillman's executors*,^(h) where the defendant had taken out letters testamentary, but omitted to file an inventory, or give notice to creditors to exhibit their claims, &c., according to the 34th section of the statute above referred to, and there were ample assets which had been collected, and the plaintiff, who had an unliquidated demand against the estate, had, by her agent, demanded her debt of the defendant, who refused to pay or take any steps towards its settlement, though a reasonable time had been allowed for those purposes, and then brought a suit in assumpsit for the demand, against the executor, which was referred by order of the circuit judge; and the referees reported in her favor for \$200: on a motion for costs against the executor, these facts, with others, showing dilatory conduct on the part of the defendant, as to adjusting the claim, appearing both by the certificate of the referees and by affidavits; it was held, that the omission by the executor to publish the notice provided for by the 34th section of the statute, excluded him from all benefit of exemption under the 41st section, and that the plaintiff was entitled to costs, as in other cases, without showing that the demand had been unreasonably resisted or neglected, or that the defendant refused to refer the matter in controversy; and that it was not necessary in such cases to produce the certificate of the circuit judge before whom the cause was tried, or other evidence, as in other cases, to enable the court to determine whether the costs should be awarded against the property of the defendant or of the deceased: that it was enough, in such cases, to show that the notice to exhibit claims had not been published.

"I am of opinion, therefore," said Mr. Justice Cowen, in his decision, after considering the case with reference to the provisions of the statute, 2 R. S. 88-90,⁽ⁱ⁾ particularly of the 41st section, and to the previous decisions, "that the 41st section has nothing to do with the case at bar; nor has any part of the provisions connected with it in the same article. If it be provided for anywhere, we must look for the provision to some other head in the statute book. I think it is to be governed by the general statute of costs, 2 R. S. 508, sec. 1, 2d ed., as qualified by Id. 509, sec. 5, and by Id. 514, sec. 38. By sections 1 and 5, just cited, the plaintiff recovering in this court over fifty, and not more than two hundred and fifty dollars, is entitled to common pleas costs. That is the case of this plaintiff; but, stopping with sections 1 and 5, we should be left in doubt whether costs may be awarded, to come from the pocket of the defendant, or from the assets of the estate which he represents. Therefore, the 38th section,^(j) the provisions of which I have before noticed and cited at large, declares, that in the case of a plaintiff recovering costs in such a case as I have shown this to be, the judgment shall be to collect *de bonis testatoris*. We have no

(h) 22 Wen. 571.

(i) See *ante*, p. 323; also, *supra*, p. 609.

(j) See *supra*, p. 609.

power to charge the defendants *personally*, for this last section expressly denies us that power, except in cases where he comes within the statute concerning summary proceedings. It is entirely clear that this case belongs to another and distinct category.

"The demand in question was unliquidated, and I do not deny that it was a fair subject of judicial inquiry, nor that the defendant and the estate of his testator should be protected from costs, had he brought himself within the 2 R. S. 29, *et seq.*, I put the case on the ground that he has not so done."

Costs, however, will not be allowed, on the ground that the executors omitted to give the requisite notice for creditors to exhibit their claims, if the suit was commenced before the time for giving notice had arrived.^(k)

And in *Bullock v. Bogardus*^(l) it was determined, overruling the case of *Harvey v. Skillman* so far as it holds a contrary doctrine, that the omission of an executor or administrator to publish a notice, requiring the creditors of the deceased to exhibit their claims, pursuant to the 34th section of the statute, does not subject them or the estate to the costs of a suit subsequently brought; that there are only two grounds for awarding costs against an executor or administrator:— 1. Where the claim has been presented, and payment has been unreasonably resisted or neglected. 2. Where there has been a refusal to refer, the claim being disputed; and that if the executor or administrator has no assets, costs cannot be given for a refusal to refer.^(m) And this decision has been followed in numerous subsequent cases.⁽ⁿ⁾

In *Belden v. Knowlton*,^(o) the suit was against an administratrix, on a check made by the intestate, dated some days after the day on which it was given. The intestate died the day after it was given. The administratrix put in an answer in the suit, setting up a variety of defences, for which there was no pretence, and among others, denying that she ever had any notice that the check was demanded and not paid. The plaintiffs recovered, but on a motion for costs against the administratrix, the court held, that inasmuch as it did not appear that any no-

(k) *Knapp v. Curtiss*, 6 Hill, 386.

(l) 1 Denio, 276.

(m) With deference it is submitted, that the reasoning in this decision can hardly be regarded as answering that of Mr. Justice Cowen, in *Harvey v. Skillman*. Mr. Justice Beardsley proceeds upon the ground, that the 41st section is the only authority for adjudging costs against executors and administrators, in suits against them. It is apprehended—and this is the position assumed by Mr. Justice Cowen—that the section in question applies to those cases only specified therein. That there may be other cases, is clearly contemplated by section 38, [sec. 37,] 2 R. S. 618, and in those cases it is respectfully urged—and such, again, is the sense of Mr. Justice Cowen's opinion—executors and administrators are liable for costs, in suits against them, the same as before the Revised Statutes, or the same as any other defendants, with the modification provided by that section. These positions of Mr. Justice Cowen may scarcely be said to be shaken by the arguments of Mr. Justice Beardsley. The case of a suit against an executor or administrator, who had omitted to advertise for claims, brought after the time within which he was authorized so to advertise, is certainly a case not specified in the 41st section. It is difficult to see wherein the rule applied to such a case by Mr. Justice Cowen, in *Harvey v. Skillman*, is erroneous.

(n) See *Wallace v. Markham*, 1 Denio, 671–3; *Russell v. Lane*, 1 Barb. Sup. Ct. Rep. 519, 523; *Van Vleck v. Burroughs*, 6 Id. 341; *Fort v. Gooding*, 9 Id. 388, 390; *Snyder v. Young*, 4 How. Prac. Rep. 217; *Lansing v. Cole*, 3 Code Reporter, 246. But see *Whitmore v. Pboas*, 1 Denio, 159.

(o) 3 Sandf. Sup. Ct. Rep. 758; 1 Code Rep. (N. S.) 127.

tice to the creditors was ever published, or that the plaintiffs ever presented their claim to the defendant, the plaintiffs were not entitled to their costs of the action against the defendant.

And even where the demand did not fall due until after the expiration of the publication of the notice for the exhibition of claims, it was held that the plaintiff was not entitled to recover his costs against the executors' defendants.(p)

Again, to entitle a plaintiff to costs against an executor or administrator, it must appear that the demand which had been presented for payment, or which the plaintiff had offered to refer, was substantially the same as that upon which the recovery was had.(q) Where, however, in an action against administrators, the plaintiff's bill of particulars differed from the account previously presented to them for payment, in the charge of interest only, it was held a variance which could not be regarded, because interest is no part of an account, it is a mere incident or legal result.(r) But where the application for costs against an executor or administrator, defendant, is upon the ground that he refused to refer, it must appear that an account, or some claim against the estate, which could be supported by vouchers and affidavits, was presented to the executor or administrator before refusal to refer. A general vague demand of a gross sum is not sufficient.(rr)

In *Doan v. Hine's Administrators*,(s) costs were refused against administrators who had suffered a judgment by default, notwithstanding that the creditor had presented his claim within the prescribed period, made affidavit of the existence of the debt, and offered to refer, where it appeared that the administrators admitted their liability, but requested a suit to be brought against a co-maker of the note, the claim in question, for whom they alleged the intestate had become bound solely as surety, offering to pay any deficiency there might be after the prosecution of such suit.

And in *Knapp v. Curtiss and others, Executors of Smith*,(ss) where a claim was presented to one of several executors, which he disputed, but declined to refer, saying he wished to consult with his co-executors before doing so, and the creditor, without waiting a reasonable time for that purpose, commenced a suit and recovered; it was held that he was not entitled to costs. It was further held, that if the creditor attempt to recover additional charges, not included in his offer to refer, he will lose the benefit of the offer; and that executors will not waive their right to resist the allowance of costs, by attending the taxation, and objecting to particular items.

Again; a creditor entitled to recover costs against an executor or administrator, on account of having made an offer to refer, which was declined, does not lose his right to them by including in his declaration the common *indebitatus* counts, in addition to one on the precise demand offered to be referred, provided his claim to recover, on the trial,

(p) *Bradley v. Burwell*, 3 Denio, 261.

(q) *Wallace v. Marikham*, 1 Denio, 671.

(r) *Lanning v. Swarts*, 9 How. Prac. Rep. 434.

(rr) *Cruikshank against Cruikshank*, 9 How. Pr. Rep. 350.

(s) 22 Wend. 639.

(ss) 6 Hill, 366.

is confined to that demand. But if he should serve a bill of particulars, claiming other demands, it seems he would lose his costs.(i)

On the other hand, in *Gansevoort v. Nelson and others, Executors, &c.*,(u) where, in an action against the executors, upon a claim which had been duly presented according to the statute, they obtained an order extending the time to plead, and afterwards pleaded the general issue, but finally suffered an inquest to be taken against them at the circuit, it was held, that inasmuch as no good reason was shown, on their part, for doubting the justice of the claim, they were chargeable with having unreasonably resisted its payment, and that the creditor was, therefore, entitled to costs; and that a statement, in the certificate of the judge who tried the cause, that payment was unreasonably resisted by the executors, is not conclusive as to costs; but the court must look beyond it, and consider the facts certified, in connection with other facts in relation to the question; and the case of *Foot v. Gumaer*, above quoted, was distinctly overruled.(v)

And a creditor will not be required, as a condition to entitle him to costs, to ask executors to refer a claim, after the latter have rejected it as unjust and not due.(w)

In *Rogers v. Holley*,(x) which was a suit against an executor, where a report of referees was made in favor of the plaintiff, and he had been delayed by the defendant in entering judgment by a motion to set aside the report; though the court did not consider it a fit case to award costs against the plaintiff, yet they allowed him to take judgment for the interest of the sum reported due by the referees, the same as for costs.

In suits against executors or administrators, the plaintiff cannot enter judgment for costs, without first obtaining leave from the court.(xx) But error will not lie upon a judgment for costs entered up against an executor or administrator, without the order of the court. Such judgment is irregular, and, upon proper application, will be set aside; but it is not error(y)—nothing being said in the return, one way or the other, about a special application having or not having been made to the court below; the superior court will intend that it was made.(yy)

Under the above 317th section of the Code of Procedure, it has been considered that a plaintiff recovering against an executor or administrator, upon a reference under the statute, is not, under any circumstances, entitled to costs, other than disbursements against the defendant; that the plaintiff is limited in his recovery to the "fees of referees and witnesses, and other necessary disbursements" specified in the section, and that all other costs are excluded.(z)

(i) *Hartshorne v. King*, 1 Denio, 675.

(u) 6 Hill, 389.

(v) It is no answer to a motion for costs against an administrator, who had refused to refer a demand, pursuant to the statute, on which a judgment was afterwards recovered, that the defendant believed he had an equitable defence which, pending the suit at law, he had filed a bill in Chancery to enforce. *Robertson v. Shiell*, 3 Denio, 161.

(w) *Fort v. Gooding*, 9 Barb. S. C. R. 388.

(x) 19 Wend. 624.

(xx) *Knapp v. Curtiss*, 6 Hill, 386; *Mulheran's Exrs. v. Gillespie*, 12 Wend. 349.

(y) 12 Wend. 355.

(yy) *Judah v. Stagg's Exrs.*, 24 Wend. 239.

(z) *Avery against Smith*, 9 How. Prac. Rep. 349. See, also, *Lansing v. Cole*, 3 Code Reporter, 246.

So, if the executor or administrator succeed upon the reference, he can recover against the plaintiff only the referees' and witnesses' fees and his disbursements.(zz)

In an action at law by a legatee, against an executor or administrator, for the recovery of a legacy, as has before been seen,(a) the costs of the action, or of either party, shall be paid as the court may direct, out of the estate of the deceased, or by the defendants personally, if their refusal to pay such legacy, or their defence of the action, shall appear to have been unreasonable.

It is proper, in this place, to refer to some cases respecting the liability of executors and administrators to the payment of costs, in suits by or against them in equity.

Where there was ground for taking the direction of the court, in relation to a legacy, and the executor submitted the question in the cheapest possible mode, he was held entitled to retain his costs of the application out of the property of the testator which was not specifically bequeathed.(aa)

In *Wood and others v. Vandenburg and others*,(b) where the provisions of the will, and situation of the testator's property, were such as to render it proper for the executors to take the opinion of the Court of Chancery in relation to the rights of the several parties interested in the property, the costs of the executors, and of the guardians *ad litem* of the several defendants who were infants, were directed to be paid out of the estate.

If executors or administrators commence a suit in Chancery, in good faith, upon probable grounds of right, and to enforce a supposed claim of the testator or intestate, they will not be charged with costs. But if they bring a suit in the Court of Chancery merely to aid a defence at law, they cannot, in case of failure, be excused from costs there, in a case in which costs would be given against them in a suit at law.(c)

Executors, it was held, previous to the Code, were liable for the costs of a bill of discovery filed by them in aid of their defence to a suit at law, where it appears from the defendant's answer that there was no fact within his knowledge which could in any way aid them in such defence.(d)

As a general rule, an executor or administrator who files a bill in Chancery for the recovery of a debt that accrued in the lifetime of the testator or intestate, and which is apparently due to the complainant in his representative character, will not be personally charged with costs, although his bill is dismissed upon the merits. But costs in Chancery are discretionary even where the suit is brought by an executor or administrator in his representative character. And if the suit is groundless and vexatious, he may be charged with costs personally. So, if an executor or administrator brings a suit in Chancery, which, from

(zz) *Van Sickler against Graham*, 7 How. Prac. Rep. 208.

(a) *Ante*, p. 406.

(aa) *In the Matter of Howe*, 1 Paige, 214.

(b) 6 Paige, 277.

(c) *Manny v. Phillips*, 1 Paige, 472.

(d) *Boughton v. Philips*, 6 Paige, 334.

papers in his possession, he had good reason to believe was unfounded; or where, by ordinary care and diligence in ascertaining the facts, he would have ascertained the suit to be unfounded, the court, in its discretion, may charge him with costs personally, if the estate in his hands is insufficient to pay such costs.(e)

A suit is wantonly brought by an executor or administrator within the meaning of the provision of the Revised Statutes on that subject, where it is brought by him without probable cause, or where he has not exercised ordinary care and diligence to ascertain whether there was any just cause of action.(f)

Where a creditor or legatee, who is entitled to a priority of payment, prosecutes for his share of the estate, the executor or administrator is the legal representative of the residuary legatees, and it is his duty to protect their rights. And if there is a fair question for litigation, and he does nothing more than his duty in attending to their interests, he will be allowed his costs out of the fund belonging to them.(g)

Where executors, who have no interest in the question in the cause, are made defendants in Chancery, they are entitled to their costs out of the fund.(h)

Where an executor neglects his duty, by omitting to invest the amount of a legacy paid into his hands, and where he refuses to bring the fund into court, when requested to do so by the legatees, for the purpose of having it secured for them, upon a bill filed against him by the legatees to compel him to comply with their request, he will be charged with the costs of the suit. But where, in the bill, the complainants make a further claim against the defendant, which they fail to establish, the parties will be left to bear their respective costs of the prosecution and defence of the suit.(i)

Where executors or administrators, without any sufficient excuse, refuse to pay over to the general guardian funds belonging to infants, they may be personally charged with costs.(j)

Where the complainant, an administratrix, brought an appeal for her own benefit, after a decision against her which ought to have been satisfactory to her counsel, it was held that she had no claim to be excused from the payment of the costs of the appeal, which costs were charged upon her personally.(k)

(e) *Roosevelt v. Ellithorp*, 10 Paige, 415.

(f) *Ib.*

(g) *Pritchard v. Hicks*, 1 Paige, 270.

(h) *Delafield v. Colden*, 1 Paige, 139.

(i) *Powell v. Murray*, 10 Paige, 256.

(j) *Stephens v. Van Buren*, 1 Paige, 479.

(k) *Gardner v. Gardner*, 6 Paige, 455.

CHAPTER XVI.

OF GUARDIANS; OF THE APPOINTMENT OF GENERAL GUARDIANS BY SURROGATES, AND OF THEIR POWERS AND AUTHORITY.

THE relation of guardian and ward applies to children during their minority, and may exist during the lives of the parents, if the infant becomes vested with property; but it usually takes place on the death of the father, and the guardian is intended to supply his place.

There are two kinds of guardianship; one by the common law, and the other by statute. It is with the latter, and that chiefly, only so far as the Surrogates' Courts in this state have the appointment and government of guardians, that this work, consistently with its design and arrangement, has the principal concern. A brief account of the other kind of guardianship, however, may not be out of place here, and will prove, it is believed, conducive to the proper understanding of the principal subject under consideration.

There were three kinds of guardians at common law, viz., guardians by nature, guardians by nurture, and guardians in socage.

"(1.) Guardian *by nature*, is the father, and, on his death, the mother; and this guardianship extends to the age of twenty-one years of the child, and it extends only to the custody of his person, and it yielded to guardianship in socage.(a) It was doubted for some time, in the books, whether the guardian by nature was entitled to the possession of the personal estate of the infant, and could give a competent discharge to an executor, on the payment of a legacy belonging to the child; and it was finally understood that he could not.(b) It would seem, therefore, that if a child becomes vested with personal property only, in the lifetime of the father, there is no person strictly entitled to take it as guardian, until a guardian has been duly appointed by some public authority, though if real estate vests in the infant, the guardian in socage, or a substitute for such guardian provided by statute, will be authorized to take charge of the whole estate, real and personal. The father has the first title to guardianship by nature, and the mother the second. The Court of Chancery, for just cause, may interpose and control that authority and discretion, which the father has in general in the education and management of his child."(c) "Attempts have been made to control the father's right to the custody of his infant children, by a legacy given by a stranger to an infant, and the appointment by him of a guardian in consequence thereof. But it is settled, that a legacy or gift to a child, confers no right to control the father's care of the child, and no person can defeat the father's right of guardianship by such means. If, however, the father accedes to the condition of the gift, and surrenders up his control of

(a) "Co. Litt. 84 a; Litt. sec. 123; Co. Litt. 87 b, 88; Hargrave's note, 12; *The King v. Thorp*, 5 Mod. Rep. 221; *Jackson v. Combs*, 7 Cowen's Rep. 36; 2 Wendell's Rep. 153, S. C."

(b) *Cunningham v. Harris*, cited in 3 Bro. 186; *Genet v. Tullmadge*, 1 Johns. Ch. Rep. 3; *Miles v. Boyden*, 3 Pick. Rep. 213."

(c) "2 Fonb. Tr. of Equity, 234, note; *Cruise v. Hunter*, 2 Cox's Rep. 242." See 2 Kent's Comm. 220.

the child's education, the Court of Chancery will not suffer him to retract it." (d)

"(2.) Guardian *by nurture*, occurs only when the infant is without any other guardian, and it belongs exclusively to the parents, first to the father, and then to the mother. It extends only to the person, and determines when the infant arrives at the age of fourteen, in the case both of males and females. As it is concurrent with guardianship by nature, it is in effect merged in the higher and more durable title of guardian by nature.

"(3.) *Guardian in socage*, has the custody of the infant's lands as well as of his person. It applies only to lands which the infant acquires by descent; and the common law gave this guardianship to the next of blood to the child, to whom the inheritance could not possibly descend; and, therefore, if the land descended to the heir on the part of the father, the mother, or other next relation on the part of the mother, had the wardship; and so, if the land descended to the heir on the part of the mother, the father, or his next of blood, had the wardship. These guardians in socage cease when the child arrives at the age of fourteen years, for he is then entitled to elect his own guardian, and oust the guardian in socage, and they are then accountable to the heir for the rents and profits of the estate. If the infant, at that age, does not elect a guardian, the guardian in socage continues." (e)

This guardianship is a personal trust, and is not transmissible by succession, nor devisable or assignable. It extends not only to the person, and all the socage estate, but to hereditaments, which do not lie in tenure, and to the personal estate. But it is admitted that the title to guardian in socage cannot arise unless the infant be seised of lands held in socage. This guardianship in socage may be considered as gone into disuse, and it can hardly be said to exist in this state, for the guardian must be some relation by blood, who cannot possibly inherit, and such a case can scarcely exist.

By the 5th section of the act "concerning the tenure of real property," (f) where an estate in lands shall become vested in an infant, the guardianship of such infant, with the rights, powers and duties of a guardian in socage, shall belong,

1. To the father of the infant.
2. If there be no father, to the mother.
3. If there be no father or mother, to the nearest and eldest relative of full age, not being under any legal incapacity; and, as between relatives of the same degree of consanguinity, males shall be preferred.

By the 6th section of the same act, to every such guardian all statu-

(d) "Lord Thurlow, in *Powell v. Cleaver*, 2 Bro. 500; *Colston v. Morris*, 6 Mad 89; *Lyons v. Blendin*, 1 Jac. 245. See, also, the *Etna*, Ware's Rep. 464. and *Stow's Com on Eq. Jur.* (Vol. II.) 574, 581, where the jurisdiction of the Court of Chancery on this subject is fully examined and sustained." See 2 Kent's Comm. 221, n.

(e) "*The King v. Preston*, Andrew's Rep. 313. The guardian in socage has lawful possession of the lands, and he may maintain actions of trespass or ejectment in respect to the lands of the ward. *Byrne v. Van Hoesen*, 5 Johns. Rep. 66; *Jackson v. De Watts*, 7 Id. 157." See 2 Kent's Comm. 222.

(f) 1 R. S. 718.

tory provisions that are or shall be in force, relative to guardians in socage, shall be deemed to apply.

By the 7th section, the rights and authority of every such guardian shall be superseded in all cases where a testamentary or other guardian shall have been appointed, under the provisions of the statute presently to be treated of.

Guardians by statute are of two kinds: testamentary guardians and guardians appointed by the Court of Chancery or by surrogates.

Testamentary guardians, to whom allusion has already been made, are founded on the deed or last will of the father, and they supersede the claims of any other guardian, and extend to the person and real and personal estate of the child, and continue until the child arrives at full age. This power in the father to constitute a guardian by deed or will, was given by the statute of 12 Charles II.^(g)

By the act "concerning guardians and wards,"^(h)

Sec. 1. Every father, whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years, and unmarried, may, by his deed or last will, duly executed, dispose of the custody and tuition of such child, during its minority, or for any less time, to any person or persons in possession or remainder.

A will merely appointing a testamentary guardian, need not be proved; and though the statute speaks of appointment *by deed*, as well as by will, yet such a disposition by deed may be revoked by will; and it is evident from the language of the English statute, and from the reason of the thing, that the deed there mentioned is only a testamentary instrument in the form of a deed, and to operate only in the event of the father's death.⁽ⁱ⁾ Though the statutes in this state, which have adopted or followed the provisions of the English statute, may have abridged its explanatory and verbose phraseology, it is not to be presumed that they intended to vary the construction of it. The better opinion is, that such a testamentary guardian will continue till the age of twenty-one, though the infant be a female, and marry in the meantime, if the will be explicit as to the duration of the trust; for the statute gives that authority to the father.⁽ⁱⁱ⁾

By sec. 2 of the above mentioned act, every such disposition, (by the deed or last will of the father,) from the time it shall take effect, shall vest in the person or persons to whom it shall be made, all the rights and powers, and subject him or them to all the duties and obligations of a guardian of such minor, and shall be valid and effectual against every other person claiming the custody or tuition of such minor, as guardian in socage, or otherwise.^(j)

Sec. 3. Any person to whom the custody of any minor is so disposed of, may take the custody and tuition of such minor, and may maintain all proper actions for the wrongful taking or detention of the minor, and shall recover damages in such actions, for the benefit of his ward.

(g) See notes to sec. 18, 1 R. L. 1813, 368.

(h) 2 R. S. 150; 4th ed. 333.

(i) The statute of Ohio in 1831, very properly drops the word deed, and gives the father the power of appointing *by will* a testamentary guardian to his infant and unmarried child.

(ii) See 2 Kent's Comm. 224.

(j) 2 R. S. 150; 4th ed. 334.

He shall also take the custody and management of the personal estate of such minor, and the profits of his real estate, during the time for which such disposition shall have been made, and may bring such actions in relation thereto, as a guardian in socage might by law.

A father only can appoint a testamentary guardian of his children. The grandfather has no such power.(j)

The distinction of guardians by nature, and by socage, seems now to be lost, or gone into oblivion, and those several kinds of guardians have become essentially superseded in practice by the *Chancery guardians*, or guardians appointed by the Court of Chancery, now by the Supreme Court, or by the surrogates in the respective counties of this state. Testamentary guardians are not very common, and all other guardians are now appointed by the one or the other of those jurisdictions. The power of the Chancellor to appoint guardians for infants who had no testamentary or statute guardian, was a branch of his general jurisdiction over minors and their estates, and that jurisdiction had been long and unquestionably settled.(k) The constitution provides that there shall be a supreme court, having general jurisdiction in law and equity. By the act in relation to the judiciary, passed 12th May, 1847,(l) it is declared that the Supreme Court, organized by the act, shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the present Supreme Court and Court of Chancery; and the justices of said court shall possess the powers, and exercise the jurisdiction now possessed and exercised by the justices of the present Supreme Court, Chancellor, Vice-Chancellors and circuit judges, so far as the powers and jurisdiction of said courts and officers shall be consistent with the constitution and provisions of the act.(m) Under these provisions the Supreme Court has exercised the power of appointment of guardians for minors.

Surrogates, by the act of the Legislature of the 5th April, 1802, as has been seen,(n) were authorized to allow of guardians who should be chosen by infants of the age of fourteen years, and to appoint guardians for such as should be within that age, in as full and ample manner as the Chancellor of this state might or could appoint or allow of the same; and the same jurisdiction is continued by the existing law.(o) And as the powers and jurisdiction of the Court of Chancery were declared(p) to be co-extensive with the same powers and jurisdiction in England, with the exceptions, additions and limitations created and imposed by the constitution and laws, it is to be inferred that the Chancellor of New York retained the jurisdiction over infants, which belonged to the Chancellor in England, and which belonged to the Chancellor of New York prior to the 1st January, 1830, when the Revised Statutes took effect. This jurisdiction is now assumed by the Supreme Court.

(j) *Hoyt v. Hillon*, 2 Edw. Ch. Rep. 202.

(k) See 2 Kent's Comm 226.

(l) S. L. 1847, 319.

(m) See 2 R. S. (4th ed.) 462.

(n) *Ante*, p. 3.

(o) See 2 R. S. 151, sec. 6; 4th ed. 334, *infra*; Ib. 220; 4th ed. 418, sec. 1; *Ante*, p. 19.

(p) 2 R. S. 173, sec. 36.

The practice in Chancery, on the appointment of a guardian, was to require a master's report, approving of the person and security offered. The court might, in its discretion, appoint one person guardian of the person, and another guardian of the estate, in like manner as in the cases of idiots and lunatics, there might be one committee of the person, and another of the estate. The guardian or committee of the estate always was required to give adequate security; but the guardian or committee of the person gave none. The same practice in all substantial particulars prevails in the Supreme Court.

By the 4th section of the above mentioned act, "relating to guardians and wards," if no guardian for the minor shall have been appointed by the father, by a deed or will, every such minor of the age of fourteen years, may apply, by petition, to the surrogate of the county where the residence of such minor may be, for the appointment of such guardian as the minor may nominate, subject to the approbation of the surrogate.(g)

Sec. 5. If such minor be under the age of fourteen years, any relative or other person, in his behalf, may apply to the surrogate of the county where such minor shall reside, for the appointment of a guardian of the minor, until he shall arrive at the age of fourteen years, and until another guardian shall be appointed. Upon the making of any such application, the surrogate shall assign a day for the hearing thereof, and shall direct such notice of the hearing to be given to the relatives of the minor residing in the county, as he shall, on due inquiry, think reasonable.(r)

By the 44th section of the act of the 16th May, 1837, "concerning the proof of wills, executors and administrators, guardians and wards, and Surrogates' Courts," it is provided that the notice required by the above 5th section shall be required to be served on such relatives only of the minor as the surrogate shall direct.(s)

Sec. 6. The surrogate to whom application may be made under either of the preceding sections, shall have the same power to allow and appoint guardians, as is possessed by the Chancellor; and in all cases he shall inquire into the circumstances of the minor, and ascertain the amount of his personal property, and the value of the rents and profits of his real estate; and, for that purpose, he may compel any person to appear before him, and testify in relation thereto.(t)

Sec. 7. [Sec. 8.] Before appointing any person guardian of a minor, the surrogate shall require of such person a bond to the minor, with sufficient security, to be approved by him, in a penalty double the amount of the personal estate, and of the value of the rents and profits of the real estate, conditioned, that such person will faithfully, in all things, discharge the duty of a guardian to such minor, according to law, and that he will render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof, when thereunto required.(u)

(g) 2 R. S. 150; 4th ed. 334.

(s) S. L. 1837, 532; 2 R. S. (4th ed.) 334.

(t) 2 R. S. 151; 4th ed. 335.

(u) 2 R. S. 151; 4th ed. 335.

(r) Ib. 151; 4th ed. 334.

Sec. 8. [Sec. 9.] The bond so taken shall be retained by the surrogate, among the papers of his office, and in case of any breach of the condition thereof, may be prosecuted in the name of the ward, although he may not have arrived at full age, by his next friend or guardian, whenever the surrogate shall direct.

Of the Appointment of Guardians for Minors over the Age of Fourteen.

The petition to the surrogate, of a minor of the age of fourteen, for the appointment of a guardian, should aver the residence of the minor in the county of the surrogate, and the age of the minor, and should nominate, subject to the approbation of the surrogate, the person desired to be appointed the guardian, and pray his appointment. It should be accompanied by the written consent of the person proposed, to accept the guardianship; and also by evidence, in the form of an affidavit or otherwise, of the amount of the personal estate, and of the value of the rents and profits of the real estate belonging to the minor, to answer the inquiry directed to be made by the above 6th section of the statute, and in order that the surrogate may fix the penalty of the bond to be taken of the guardian, pursuant to the 7th section. Other evidence concerning the property of the minor, besides that so furnished, may be demanded by the surrogate. "The proper course" says the Chancellor in *Bennett v. Byrne*,^(v) "for the surrogate upon the appointment of a guardian, is to ascertain by the examination of witnesses, the probable amount of the personal estate, and of the income of the realty during the minority of the infant." And it would seem proper that some written evidence should be produced that the minor is of the requisite age to entitle him to make the application himself.

If the surrogate approve of the person nominated, upon his executing a bond to the minor, with sufficient security, according to the provisions of the 7th section, he is appointed the guardian, and letters of guardianship are granted and issued to him. Personal security is usually offered. If such be the case, the surrogate may require and take evidence of the pecuniary responsibility of the surety, and in nearly all cases he will require him to justify in the amount of the penalty of the bond. Usually, only one surety is demanded. Other sufficient security, as by mortgage of real estate, may be accepted, as the statute does not prescribe the kind of security to be required; but such is not commonly offered. Where there are several guardians, the statute requiring the surrogate, upon the appointment of guardians, to take from every guardian a bond with surety, &c., is complied with by taking one joint and several bond from all the guardians, with surety.^(w) Upon granting the letters, an order allowing the same to issue should be made and entered in the surrogate's minutes. (For forms for proceedings on the appointment of a guardian of a minor of the age of fourteen, and form of the letters of guardianship, see Appendix, No. 116.)

^(v) 2 Barb. Ch. Rep. 216.

^(w) *Kirby v. Turner*, 1 Hopkins' Ch. Rep. 309.

Of the Appointment of Guardians for Minors under the Age of Fourteen.

In the case of a minor under the age of fourteen years, the petition for the appointment of a guardian must come from a relative or other person in behalf of the minor. It is usually presented by a person proposing to be himself appointed the guardian. It should state the relationship, if such be the case, of the petitioner to the minor, the residence of the minor within the county of the surrogate, his age, and the amount of his personal estate, and the value of the rents and profits of his real estate. It should also state the names of the relatives of the minor residing in the county, and the particulars of their relationship, to enable the surrogate to give the proper directions with regard to notice to the minor's relatives, pursuant to the provisions of the above 5th section of the statute and of the law of 1837. Its prayer will be for the appointment of the petitioner or some other suitable person as the guardian of the minor until he shall arrive at the age of fourteen years, and until another guardian shall be appointed. If the petitioner pray for his own appointment, that will be a sufficient consent to accept of the guardianship; if the prayer be for the appointment of another person, the petition should be accompanied by his consent to accept.

The petition should be under oath, and upon presenting the same, the surrogate assigns a day for the hearing thereof, and decides as to the notice to the relatives of the minor residing in the county, provided for by the above sections of the statutes. The statute is imperative that the surrogate shall assign a day for the hearing of the application, and shall direct such notice of the hearing to be given to the relatives of the minor residing in the county, as he shall, upon due inquiry, deem reasonable. This provision, as originally enacted in the Revised Statutes, seems to have borne the construction that all the relatives of the infant, either by affinity or consanguinity, if they resided in the county, were to be notified of the time and place appointed for the hearing of the application; and that the surrogate was only to decide upon the reasonableness of the notice. The act of 1837 has modified the provisions of the Revised Statutes in this respect, by declaring that the notice shall be required to be served on such relatives only of the minor as the surrogate shall direct. This modification, however, does not relieve the surrogate from the duty of making the inquiry contemplated by the Revised Statutes, for the purpose of ascertaining who are the relatives of the infant residing in the county, and of directing notice of the application to be given to such and so many of them as may be deemed reasonable for the purpose of having the rights of the infant properly attended to upon the application. Where the application is made by one who is not nearly related to the infant either by affinity or consanguinity, it is the duty, therefore, of the surrogate to inquire and ascertain whether the infant has any such relatives in the county, who are of sufficient age and capacity to protect the rights and interests of the minor in the selection of a proper guardian, and in obtaining sufficient security from such guardian in reference to the nature and value of the infant's property. And if the nearest relatives of the infant do not join in the application, or give their consent to the same, the surrogate should direct notice to be given to such and so many of

them who are residing in the county, as he may deem necessary to protect the infant's interest and rights on such application. He should enter his decision on that subject in the minutes of his proceedings, and should require the applicant to furnish the evidence of the service of such notice before he proceeds to make the appointment. So, where the application is made by a relative of the infant, the surrogate should make the requisite inquiries, and ascertain whether there are any other relatives related to the infant in the same degree, or more nearly, and direct notice of the hearing of the application to be given accordingly. And where the surrogate errs, either by neglecting to make the proper inquiries as to who are the relatives of the infant, or in not directing notice to be given to such of the relatives as, in the exercise of a sound discretion, he should have directed to be notified of the time and place of hearing the application, the Appellate Court may reverse his decision, and may set aside the appointment of the guardian upon that ground.(x)

An order directing the notice to be given, specifying the names of the relatives upon whom it must be served, and the number of days' service to be given, is entered in the surrogate's minutes. From four to eight days' service is usually allowed.

On the day named in the notice, upon proof of the due service thereof, the hearing on the petition takes place. The parties may appear either in person or by counsel. The surrogate may, if he thinks proper, appoint one of the relatives, or any other suitable person, the guardian *ad litem* of the infant in relation to the application, for the purpose of procuring the requisite proofs, so as to prevent an improper appointment of a guardian, or the taking of insufficient security in reference to the property; and he may examine the relatives of the minor, or any other persons, on oath, as to any matter connected with the application, or as to the propriety of granting the same.(y)

On the hearing, the same inquiry is to be made as to the qualifications of the proposed guardian, and the sufficiency of the security offered, as in the case of an application for the appointment of a guardian of a minor over fourteen years of age. Besides these subjects of investigation, the title of the party to be appointed the guardian may also be a matter of dispute. It is often a litigated question of great importance to the parties as to who is entitled to guardianship. The Revised Statutes originally contained a section, numbered 7, declaring the order of priority to be observed in the appointment, which was derived from the practice in the Court of Chancery; but, upon the suggestion that difficulties might arise in pursuing the order therein prescribed, and as the 6th section gives the surrogate the same power in relation to the appointment as is possessed by the Chancellor, it was deemed best to repeal the section in question, which was accordingly done by the act of 1830, chap. 320, sec. 31.(z)

(x) *Underhill v. Dennis*, 9 Paige, 206-7. See, also, *White v. Pomeroy*, 7 Barb. S. C. R. 640.

(y) See *Kellinger v. Roe*, 7 Paige, 363.

(z) See 3 R. & Or. S. App. 663. The section which was repealed gave the preference, in the appointment as general guardian: 1. To the mother; 2. To the grandfather, on the father's side; 3. To the grandfather, on the mother's side; 4. To either of the uncles, on the

It is a most important question, for an infant of tender age, who shall have the charge of his education and estate. It depends on the guardian, whether he shall be nurtured and trained under such influences and associations as to fit him for a station of respectability and honor in society; or whether he shall be so reared as to be led by bad precept and example, to profligacy and ruin. The safeguards, therefore, which the law has thrown around the infant, to prevent an injudicious appointment, are not to be disregarded.(a) The true interests of the infant are to be consulted in making the appointment of his guardian, rather than the interests or the wishes of those who are contending for the guardianship.(b)

As between an uncle and a stranger, contending for the guardianship, other things being equal, the uncle is to be preferred as guardian.(c)

The fact that the real estate of the infant came to him by descent from his father, and not from his mother, affords no sufficient ground for giving a preference to the paternal relatives of the infant, over the maternal relatives of the same degree of affinity or consanguinity, in the appointment of guardian. The declared wishes of the deceased parents of an infant, in relation to the manner in which he should be brought up, and as to whose care he should be committed during his infancy, are entitled to much weight in deciding upon the claim of the different relatives to the guardianship of the infant.(d)

So the fact that the mother of an infant, upon her deathbed, expressed the wish that a particular relative should adopt such infant and bring it up as his own, and should see that its property was not wasted, should have a preponderating influence with the surrogate, other things being equal, in favor of the appointment of such person as guardian of the infant. And the probability, if a particular person should be appointed guardian, that the estate will be subjected to the expense of a new appointment, within a very short time, and to the other expenses incident to a change of guardianship, is a circumstance entitled to some weight in favor of the appointment of another person by the surrogate.(e)

Again, where a person, applying to be appointed guardian of an infant, is already the trustee of such infant, for the purpose of expending the income of an estate for his support and education, it is a circumstance in favor of his appointment as such guardian; in order that the infant may not be subjected to the expense of separate accounts of the expenditures for his support, the one on the part of the trustee, and the other by the guardian.(e) And in a very recent case, in the Supreme Court at general term in the third district, this rule has been recognized and acted upon.(f)

father's side; 5. To either of the uncles, on the mother's side; 6. To any one of the next of kin to the minor, who would be entitled to a distributive share of his personal estate, in case of his death.

(a) *White v. Pomeroy*, 7 Barb. S. C. R. 640.

(b) *Bennett v. Byrne*, 2 Barb. Ch. Rep. 216.

(c) *Morehouse v. Cooke*, Hopkins, 226.

(d) *Underhill v. Dennis*, 9 Paige, 203.

(e) *Bennett v. Byrne*, 2 Barb. Ch. Rep. 216.

(f) *Boyd v. Davis*, MS.

The surrogate determines upon any conflicting claims which may be made to the guardianship, and his decision is stated in the order for the appointment. If a person other than the one named in the petition be appointed, his written consent to accept should be produced and filed. A similar bond is to be taken, and a similar order is to be entered, in the case of the appointment of a guardian for an infant under the age of fourteen, to those in the case of an infant over that age. (For forms for the proceedings, see Appendix, No. 117.)(g)

Of the Power and Authority of the Guardian.

The power and authority of the guardian remain to be here considered.

By sec. 9 [sec. 10] of the above mentioned title of the Revised Statutes relative to guardians and wards, every guardian, so appointed by a surrogate, (according to the provisions and directions above given,) shall have the same powers as a testamentary guardian; and every person so appointed guardian of a minor, under the age of fourteen years, shall continue guardian of such minor, and shall be responsible as such, notwithstanding the said minor may arrive at the age of fourteen years, until another guardian be appointed, or such first guardian be discharged according to law.(h)

A guardian of an infant who is under fourteen, appointed by the Court of Chancery, continues such guardian until the infant is twenty-one years of age, unless sooner removed by the court appointing him; and the infant, upon arriving at the age of fourteen, cannot have a new guardian appointed as of course.(i)

The guardian of the estate has no further concern with, or control over, the real estate, than what relates to the leasing of it, and the reception of the rents and profits, and it is his duty to place the ward's land upon lease. He has such an interest in the estate of his ward, as to enable him to avow for *damage feasant*, and to bring trespass or ejectment in his own name. These were common law rights belonging to the guardian in socage, and they apply to the general guardian at the present day. He may lease during the minority of the ward, and no longer, but he cannot sell without the authority of the Court of Chancery.(j) The infant may, by his guardian, apply to that court, for the sale or disposition of his property; on such application, the court appoints a guardian specially for the infant, in relation to the proceedings on such application; a reference to a master is had to inquire into the merits of the application; and then, whenever it shall appear satisfac-

(g) As in the Court of Chancery, so the surrogate may, in his discretion, appoint one person guardian of the person and another guardian of the estate of the infant; but security is not entirely dispensed with from the former, as in that court, a bond with surety being taken, although its penalty is in merely a nominal amount. Instances of this kind, however, are not numerous, and occur almost exclusively in those cases where the Life Insurance and Trust Company is appointed guardian of the estate of the infant; in which cases, a separate guardian for the person becomes necessary. In all other cases the same person is appointed guardian of both the person and the estate of the infant.

(h) 2 R. S. 151; 4th ed. 335.

(i) "*In the Matter of Dyer*," 5 Paige, 534.

(j) See 2 Kent's Com. 228, and cases cited.

torily that a disposition of any part of the real estate of such infant, or of his interest in any term for years, is necessary and proper, either for the support and maintenance of such infant, or for his education; or that the interest of such infant requires, or will be substantially promoted by, such disposition, on account of any part of his said property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances, the court may order the letting for a term of years, the sale, or other disposition of such real estate or interest, to be made by such guardian or guardians so appointed, in such manner, and with such restrictions as shall be deemed expedient. But no real estate or term for years shall be sold, leased or disposed of, in any manner against the provisions of any last will, or of any conveyance, by which such estate or term was devised or granted to such infant.(k)

By section 91, [sec. 86,] 2 R. S. 330,(l) whenever it shall appear satisfactorily, by due proof, or on report of a master, to the Court of Chancery, (now the Supreme Court,) that any infant holds real estate in joint tenancy, or in common, or in any other manner which would authorize his being made a party to a suit in partition, and that the interest of such infant, or of any other person concerned therein, requires that partition of such estate should be made, such court may direct and authorize the general guardian of such infant to agree to a division thereof, or to a sale thereof, or of such a part of the said estate as in the opinion of the court shall be incapable of partition, or as shall be most for the interest of the infant, to be sold.

This provision does not authorize the guardian to sell to a co-tenant, but only to join with the other tenants in common in a sale of the joint interest in the property. The court will not authorize the guardian to join in a sale except on the report of a master that such sale is necessary and proper; and the guardian must give security for the faithful performance of his trust on such sale, and to bring the proceeds of the infant's share into court, or to invest and account for the same, as the court shall direct. If a co-tenant wishes to buy the infant's share in an estate which cannot be divided, and is willing to give the fair value thereof, the general guardian should apply for liberty to sell, under the article of the Revised Statutes above referred to, relative to the sale and disposition of infants' estates. It is a sufficient ground to authorize a sale of an infant's property, that it is held in common with adults, and that the value of the estate is small in comparison with the expense of a partition suit to which it must otherwise be subjected.(m)

The guardian may sell the personal estate of his ward for the purposes of the trust without a previous order of the court, and such sale, without a previous order, if fair, would undoubtedly be good as to the purchaser, but the safer course for the guardian is, to have a previous order.(n) Such an order the Surrogate's Court is clearly competent to make.

(k) See 2 R. S. 195, sec. 176 *et seq.*; 4th ed. 359-60.

(l) 4th ed. 590.

(m) "*In the Matter of Congdon*," 2 Paige, 566.

(n) See 2 Kent's Comm. 228, and note b.

Where the appointment of a person as guardian of a minor is invalid, his subsequent appointment as administrator of his ward's father will also be erroneous, if his claim to be appointed administrator rests upon the fact that he has been appointed guardian, and is entitled to administer in the right of his ward; and letters have been issued to him without any citation or notice to relatives having a prior right to the administration.(nn)

Again, a guardian appointed out of this state is not entitled to receive from the administrator in this state the portion or legacy of the infant. But to acquire such right he must be appointed in this state, and give the proper security;(o) and, generally, the rights and powers of the guardians over the person and property of their wards are, like the rights and authorities of executors and administrators, strictly local, and cannot be exercised in other states, for they come within the same reasoning and authority.(p) Nor have they any authority over the real property of their wards situate in other countries, for such property is governed by the law *rei sitæ*.(q)

It has appeared, at a previous page of this work,(r) that a legacy to a minor, if under the value of fifty dollars, may be paid to his father, to the use and for the benefit of such minor; that if the legacy be of the value of fifty dollars or more, the same may, under the direction of the surrogate, be paid to the general guardian of the minor; but, that to entitle the general guardian to receive such legacy, he must give security to the minor, to be approved by the surrogate, for the faithful application and accounting for such legacy. At a previous page of this work,(s) it also appeared that where a distributive share is to be paid to a minor, the surrogate may direct the same to be paid to the general guardian of such minor, and to be applied to his support and education. The proceedings in behalf of a minor, by his guardian, to recover a legacy or distributive share due to the minor by an action at law, were also referred to in that portion of this work treating of the subject of legacies and distributive shares.(t)

Where there are several guardians of an infant's estate, they may act either separately or in conjunction. They are jointly responsible for joint acts; and each is separately answerable for his separate acts and defaults.(u)

(nn) *White v. Pomeroy*, 7 Barb. S. C. R. 641.

(o) *Morrell v. Dickey*, 1 Johns. Ch. Rep. 153.

(p) *Morrell v. Dickey*, 1 Johns. Ch. Rep. 156, and other cases and authorities cited in note to 2 Kent's Comm. 228.

(q) Story's Conf. of Laws, 414-17.

(r) *Ante*, pp. 404, 426. See 2 R. S. 91; 4th ed. 276.

(s) *Ante*, pp. 527, 542. See 2 R. S. 98.

(t) See *Ante*, pp. 405-6, 425. See 2 R. S. 115.

(u) *Kirby v. Turner*, Hopkins, 309.

CHAPTER XVII.

OF THE DUTIES AND LIABILITIES OF GUARDIANS; OF COMPELLING THEM TO ACCOUNT IN THE SURROGATE'S COURT; OF THE RENDERING AND SETTLING OF THEIR ACCOUNTS, AND OF PROCEEDINGS IN THE SURROGATE'S COURT FOR THEIR REMOVAL.

By section 19 [sec. 20] of the title of the Revised Statutes relative to guardians and wards, it is declared and required that every guardian in socage, and every general guardian, whether testamentary or appointed, shall safely keep the things that he may have in his custody belonging to his ward, and the inheritance of his ward, and shall not make or suffer any waste, sale or destruction of such things or of such inheritance, but shall keep up and sustain the houses, gardens and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his hands; and shall deliver the same to his ward, when he comes to his full age, in as good order and condition, at least, as such guardian received the same, inevitable decay and injury only excepted; and he shall answer to his ward for the issues and profits of real estate received by him by a lawful account.(a)

By sec. 20, [sec. 21,] if any guardian shall make or suffer any waste, sale or destruction of the inheritance of his ward, he shall lose the custody of the same, and of such ward, and shall forfeit to the ward thrice the sum at which the damages shall be taxed by the jury.

The guardian's trust is one of obligation and duty, and not of speculation and profit. He cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the infant's benefit.(b) It has been held that he has no right to commute the debts or judgments due the ward or infant, and that if he do, he is responsible for the amount and interest.(c) If he takes notes or other securities, for money belonging to his ward, in his own name, he converts the property to his own use, and is *prima facie* accountable for it. Thus, if a guardian surrenders contracts for land, and takes deeds in his own name, and pledges his personal responsibility for a part of the purchase money, this will be held a conversion of the contracts to his own use; and the ward may adopt the transaction, or claim from the guardian the value of the land contracts, at his election.(d) It is his duty to take care of, and account for the money of his ward from whatever source derived, and he would, therefore, be accountable as guardian for money received by him here for their lands in another state when legally sold.(dd) He is bound to rent his ward's land, and if he neglect it, he will be charged with the esti-

(a) 2 R. S. 153; 4th ed. 336.

(b) See 2 Kent's Comm. 229.

(c) *Forbes v. Mitchell*, 1 J. J. Marsh. Rep. 441. Whether insolvency of a debtor constitutes an exception? *Quære*, Ib.

(d) *White v. Parker*, 8 Barb. S. C. R. 48.

(dd) *Duncan et al v. Paity's Heirs*, 5 Dana, 223.

mated rent.(e) If the guardian has been guilty of negligence in the keeping or disposition of the infant's money, whereby the estate has incurred loss, the guardian will be obliged to sustain the loss. The guardian must not convert the personal estate of the infant into real, or buy land with the infant's money, without the direction of a court of equity.(ee) The power resides in that court to change the property of infants from real into personal, and from personal into real, whenever it appears to be manifestly for the infant's benefit.(f) It is said that the latter power may be exercised by a guardian or trustee, in a clear and strong case, without the previous order of a court of equity; but it is an extremely perilous act, and cannot be recommended; and the infant, when he arrives at full age, will be entitled, at his election, to take the land or the money with interest;(g) if he elect the latter, however, Chancery will take care that justice be done, by considering the ward as trustee for the guardian of the lands standing in his name, and will direct the ward to convey. And if the guardian puts the ward's money in trade, the ward will be equally entitled to elect to take the profits of the trade, or the principal, with compound interest, to meet those profits when the guardian will not disclose them. He cannot trade with himself, on account of his ward, nor buy or use his ward's property for his own benefit. All advantageous bargains which a guardian makes with the ward's funds will enure to the benefit of the ward, at his election.(h) So, if he neglects to put the ward's money at interest, but negligently, and for an unreasonable time, suffers it to lie idle, or mingles it with his own, the court will charge him with simple interest, and in cases of gross delinquency, with compound interest. Where, however, there is no proof as to the ability of a guardian safely to invest his ward's money on interest, he will be allowed a reasonable time to do so; usually six months.(h) These principles are understood to be well established in the English equity system, and they apply to trustees of every kind; and the principal authorities upon which they rest were collected and reviewed in the Chancery decisions of this state, to which it will be sufficient to refer, as they have recognized the same doctrine.(hh)

The relation which a guardian maintains to his ward is not that of a contract debtor to his creditor. Where he has received the money of his ward, the law will doubtless raise an implied promise to pay it over, when the latter arrives at age, if he chooses to bring an action of assumpsit. But the guardian cannot, by any act of his, change his duties and liabilities from those of a trustee to those of a mere contract debtor.(i)

(e) *Jones v. Ward*, 10 Yerger, 161.

(ee) *White v. Parker*, 8 Barb. S. C. R. 48.

(f) See the cases cited in 2 Kent's Comm. 230, from whence this summary of the duties of guardians is for the most part taken.

(g) *Eckford v. De Kay*, 8 Paige, 89; *White v. Parker*, 8 Barb. S. C. R. 48.

(h) *White v. Parker*, 8 Barb. S. C. R. 48.

(hh) "*Green v. Winter*, 1 Johns. Ch. Rep. 26; *Duncomb v. Duncomb*, Ib. 508; *Schieffelin v. Stewart*, Ib. 620; *Holdridge v. Gillespie*, 2 Johns. Ch. Rep. 30; *Davoue v. Fanning*, Ib. 252; *Smith v. Smith*, 4 Johns. Ch. Rep. 281; *Everton v. Tappan*, 5 Johns. Ch. Rep. 497; *Clarkson v. Depeyster*, 1 Hopkins' Rep. 424; *Rogers v. Rogers*, Ib. 515." See 2 Kent's Comm. 230, n.; and see *Rapalye v. Hall*, 1 Sandf. Ch. Rep. 399; *White v. Parker*, 8 Barb. S. C. R. 48.

(i) *Seaman v. Duryea*, 10 Barb. S. C. R. 524.

A guardian, however, acting within the scope of his powers, is bound only to fidelity, and ordinary diligence and prudence in the execution of his trust; and his acts, in the absence of fraud, will be liberally construed.⁽ⁱⁱ⁾

It is a violation of duty on the part of a guardian to permit his infant ward to live in idleness, and to support him out of his estate, when he is capable of supporting himself by his industry. And where the guardian permits him to be brought up in idleness, the infant will not be liable to the guardian for the support furnished him in the meantime. But the means of support furnished to an infant, by his guardian, while he is being educated and prepared for future usefulness, will be allowed to the guardian as necessities.^(j)

Though the father be liable for necessities supplied to his child without his consent, because he is bound to support him, and is entitled to his services, yet a guardian is not so liable.^(j')

It is the duty of the guardian to see to the proper application of the infant's property towards his maintenance. As the surrogate has power by the statute,^(k) to direct and control the conduct of guardians appointed by him, he possesses authority to make due regulation for the maintenance of the wards.^(kk) His jurisdiction in this respect is probably similar to, and co-extensive with that of the Supreme Court in the same case. There formerly existed much difficulty, on the part of the Court of Chancery, in interfering upon the petition either of the guardian or of the infant, to direct a suitable maintenance for the latter. The effect of this doubt was to allow the guardian to exercise his discretion at his own peril; and thus to leave much to his sense of duty; and much more to his habits of bold or of timid action in assuming responsibility. At present, a different course is pursued; and in ordinary cases, at least, where the property is small, the court will, upon petition, without requiring the more formal proceedings by bill, settle a due maintenance upon the infant. Lord Hardwicke, in vindication of this latter course, said: "There may be a great convenience in applications of this kind, because it may be a sort of check upon infants, with regard to their behavior; and it may be an inducement to persons of worth to accept of the guardianship, when they have the sanction of this court for anything they do on account of maintenance; and likewise of use in saving the expense of a suit to an infant's estate."^(l) These are considerations which certainly ought never to be lost sight of in regulating the practice of the court; for it seems not to be a question as to the jurisdiction of the court.^(m)

(ii) *White v. Parker*, 8 Barb. S. C. R. 48.

(j) *Clark v. Clark*, 8 Paige, 152.

(j') *Call v. Ward*, 4 Watts and Serg. 118.

(k) 2 R. S. 220, (4th ed. 418,) sec. 1, subdiv. 7. See *ante*, p. 19.

(kk) This power is now disputed on the part of the court, but was exercised without question by the surrogate of the county of New York previous and up to 1844. See the opinion of the Chancellor "*In the Matter of the petition of Francis E. Parker*," (1 Barb. Ch. R. 154,) where the Chancellor considers the application of the provision in the same section of the statute, authorizing the surrogate "to direct and control the conduct of executors and administrators;" but his remarks, after all, do not reach the case mentioned in the text.

(l) "*Ex parte Whitfield*," 2 Atk. 316."

(m) 2 Story's Eq. Jur. sec. 1354.

In allowing maintenance, the court will have a liberal regard to the circumstances and state of the family to which the infant belongs. Such considerations will apply to a father or mother of the infant who is in distressed or narrow circumstances. On the other hand, in allowing maintenance, the court usually confines itself within the limits of the income of the property. But where the property is small, and more means are necessary for the due maintenance of the infant, the court will sometimes allow the capital to be broken in upon. But, without the express sanction of the court, a guardian will not be permitted of his own accord to break in upon the capital.(n)

Of the Accounts of Guardians.

By section 57 of the act of the 16th May, 1837, concerning the proof of wills, guardians and wards, &c., it is provided, that every general guardian appointed by the surrogate shall, annually after such appointment, so long as any part of the estate, or the income or proceeds thereof, remain in his hands or under his control, file in the office of the surrogate appointing him, an inventory and account under oath, of his guardianship, and of the amount of property received by him and remaining in his hands, or invested by him, and the manner and nature of such investment, and his receipts and expenditures, in form of debtor and creditor.(o) ●

By section 58, every surrogate shall annex to, and deliver with each appointment of a general guardian made by him, a copy of the preceding section, and shall file in his office all accounts and inventories before mentioned; and in the month of February in each year, shall examine all such accounts and inventories as shall have been filed in his office for the preceding year.

By section 60, if on such examination the surrogate shall be satisfied, in any case, that the interest of the ward requires that a more full and satisfactory account should be given, or that such guardian should be removed; or in case any guardian shall neglect to file such account and inventory for three months after the same should have been filed, such surrogate shall proceed against such guardian in the manner prescribed in the fourteenth section of title third of chapter eight of the second part of the Revised Statutes, and sections fifteen, sixteen, seventeen, eighteen and nineteen of said title, shall extend to proceedings authorized by this section. But such surrogate may discontinue such proceedings, on such guardian filing in his office an account and inventory satisfactory to said surrogate, and on payment of all costs which may have accrued in consequence of such neglect.(oo)

The form of the inventory and account to be rendered pursuant to the above 58th section, is very plainly declared by its provisions. The dates of the various items of receipts, expenditures and investments, will of course be given. The guardian should correctly charge himself with such amounts of interest on uninvested funds as he is justly liable for to his ward. If he neglect to make investments, he

(n) See 2 Story's Eq. Jur. sec. 1355, and cases cited.

(o) S. L. 1837, 534; 2 R. S. (4th ed.) 338.

(oo) S. L. 1837, 534; 2 R. S. (4th ed.) 338.

is chargeable with the interest of the unemployed funds commencing six months after the receipt of the moneys.(p)

By section 21 [sec. 22] of the above mentioned title of the Revised Statutes, guardians shall be allowed for their reasonable expenses, and the same rate of compensation for their services as is provided by law for executors.(q)

The rate of compensation for their services provided by law for executors is, as was seen at a previous page of this work.(qq) 1. For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five dollars per cent. 2. For receiving and paying out any sums exceeding one thousand dollars, and not amounting to five thousand dollars, at the rate of two dollars and fifty cents per cent. 3. For all sums above five thousand dollars, at the rate of one dollar per cent.

The guardian should charge his ward in his annual accounts, respectively, his reasonable expenses incurred in behalf of his ward, up to the time of rendering the same, or since the rendering of his last account. It is also proper for him to compute his commissions upon his receipts and disbursements of each year, so as to credit such commissions in the annual accounts, for the purpose of ascertaining the true balance in his hands at each annual accounting. But he is not to be allowed full commissions upon every receipt and investment of the trust fund committed to his care and management.

The principles laid down in a former page of this work when treating of the subject of the allowance of commissions to executors and administrators,(r) apply in every particular to such allowance to guardians. Some of the remarks there made taken from the decision of the Chancellor, "*In the Matter of Kellogg*,"(s) it is deemed proper to repeat in this place with others.

"The investment or re-investment of the fund, from time to time, upon new securities, for the purpose of producing an income therefrom," it was there said, "is not such a paying out of the trust moneys as entitles the guardian or trustee to commissions for paying out the same, within the intent and meaning of the statute on this subject, unless such securities are finally turned over to the *cestui que* trust as money, or otherwise applied in payment on account of the estate. Neither is the guardian or trustee entitled to charge a new commission for the collecting or receiving back of the principal of the fund which he has so invested. But he will be entitled to commissions upon the interest or income of the fund produced by such investments, and received and paid over by him. The statute gives a certain allowance, by way of commissions, for receiving and paying out moneys by executors, guardians, &c., without specifying how much is allowed for receiving, and how much for paying out the same. And it may sometimes happen, upon a loss of the fund without any fault on the part of the guardian or other trustee, or upon a change of trustees, that the

(p) *De Peyster v. Clarkson*, 2 Wen. 77; *White v. Parker*, 8 Barb. S. C. R. 48.

(q) 2 R. S. 153; 4th ed. 336.

(qq) *Ante*, p. 448, 492 *et seq.* See 2 R. S. 93, sec. 53.

(r) See *ante*, pp 492 to 497.

(s) 7 Paige, 267.

guardian or trustee may be entitled to compensation for one service, and not for the other. In such cases, the language of the statute must be construed with reference to the decisions of Chancellor Kent, *In the Matter of Roberts*,^(ss) where he first established the allowance to be made in such cases, in conformity with the directions of the act of April, 1817; that is to allow one-half commissions for receiving, and one-half for paying out the trust moneys.

"The proper rule, therefore, for computing the commissions upon the first annual statement, or passing of the accounts, of the guardian, receiver or committee, who is required to render or pass his account periodically during the continuance of the trust, is to allow him one-half of the commissions, at the rates specified in the statute, upon all moneys received by him, as such trustee, other than the principal moneys received from investments made by him on account of the trust estate. And he is also to be allowed his half commissions on all moneys paid out by him, other than moneys invested or re-invested by him in bonds and mortgages, stocks, or other securities, for the benefit of the trust estate under his care and management; leaving the residue of his half commissions upon the fund which has come to his hands, and which remains invested or unexpended at the time of rendering or passing such account, for future adjustment when such funds shall have been expended, or when the trustee makes a final settlement of his account upon the termination of the trust. And upon every other periodical statement of the account during the continuance of the trust, half commissions should be computed in the same manner upon all sums received, as interest or income of the estate, or as further additions to the capital thereof, since the rendering or passing of his last account, and half commissions upon all sums expended, except as investments."

Other particulars relative to the accounts of guardians, will presently be considered in connection with the subject of the rendering and settling of their accounts, either at the instance of the ward or some person on his behalf, or at their own instance.

A strict observance of so much of the above 58th section as requires the surrogate, in the month of February in each year, to examine the accounts and inventories of guardians which shall have been filed in his office for the preceding year, and of so much of the 60th section as requires him to take proceedings *ex officio* against delinquent guardians, must be found impracticable by a surrogate having jurisdiction over a large population. The proceedings for the removal of a guardian, referred to in the above 60th section, will hereafter be treated of when the provisions of the statute therein mentioned come in their due order to be considered.

The guardian is liable to an action of account at common law, by the infant after he comes of age; and the infant, while under age, may, by his next friend, call the guardian to account by an action in the nature of a former suit in Chancery.

The general jurisdiction over every guardian, however appointed, resides in the Supreme Court; and a guardian appointed by the surrogate, or by will, is as much under the superintendence and control of

(ss) 3 Johns. Ch. Rep. 43.

the Supreme Court, and of the power of removal by it, as if he were appointed by the court.(t)

Where a testamentary guardian holds a fund for the sole benefit of his wards, in his character of guardian, to be invested for their use, the Supreme Court may change the investment from that which is directed by the testator, where it is for the benefit of the infants that such change should be made, even without the consent of such guardian.(u)

Of the Rendering and Settling of the Accounts of Guardians in the Surrogate's Courts.

The authority of the surrogate to compel guardians to render accounts and to settle their accounts, is now to be considered. The proceedings on the part of the surrogate, *ex officio*, against a guardian, where he neglects to file an account and inventory for three months after the same should have been filed, pursuant to the law of 1837, has already been adverted to.

By sec. 10 [sec. 11] of the above mentioned title of the Revised Statutes, relative to guardians and wards, any guardian appointed by any surrogate, may be cited to account before the surrogate who appointed him, in the same manner as administrators, upon the application of any ward, or any relative of such ward; and on good cause being shown, may be compelled to account in the same manner as an administrator. And upon a ward's arriving at full age, he shall be entitled to compel such account, without showing any cause.(v)

The terms of this section are not perfectly explicit in respect to cases where the ward is still an infant. The guardian may be cited to account in the same manner as administrators, and on good cause being shown, may be compelled to account in the same manner. But the statute relative to compelling administrators to account, provides for an order to account, rather than for citing them,(vv) which is peremptory in its language in the first instance, and does not require any cause to be shown.

The practice, however, on compelling a guardian to account, has been the same as that on compelling an account from an executor or administrator. The ward, or his relative, must present a written petition to the surrogate, setting forth the appointment of the guardian, and the time thereof, the relationship of the petitioner to the ward, if the petition be made by a relative, and the facts and circumstances which render an account necessary from the guardian, and constitute the cause of the application for the account. He should also allege that an account has been applied for and refused; and the reader is referred for other particulars, which may be included in the petition, to the observations made at a previous page of this work,(w) on the petition in the similar proceeding of compelling an executor or administrator to account. The prayer of the petition will be, that the guardian be com-

(t) 2 Kent's Comm. 227, and cases cited; *Disbrow v. Henshaw*, 8 Cowen, 349.

(u) *Wood v. Wood*, 5 Paige, 596.

(v) 2 R. S. 152; 4th ed. 335.

(vv) See 2 R. S. 92, sec. 52; *Ante*, p. 446, 454, 457, n.

(w) See *ante*, p. 452 *et seq.*

pelled to account before the surrogate. If an allowance for the maintenance of the infant be desired, the proper allegations of the necessity for such allowance should be embraced in the petition, and a prayer should be included for the granting of the same.

On filing the petition, the surrogate makes an order or issues a citation, similar to that in the proceeding on compelling an executor or administrator to account, of which the same number of days' service, (30 days,)(x) must be given, and the same service must be made as in that case.(y)

On the return day of the order or citation, similar proceedings are to be had before the surrogate for determining the justness and correctness of the accounts kept and rendered by the guardian, if the same be disputed, to those in the case of an accounting by an executor or administrator. Disbursements on account of the ward must be proved by vouchers or otherwise, and witnesses may be examined on either side, touching any of the items in the account, the same as in that case. On the conclusion of the proceedings, the surrogate makes a decree settling the account rendered by the guardian, and determining the liability of the guardian for the property of his ward, according to the proofs which have been adduced before him. If an allowance for maintenance has been prayed for in the petition, the proper allowance also should be fixed by the decree. Some further particulars respecting this accounting may be gathered from the observations which will presently be made, regarding the settlement of the accounts of a guardian, brought on upon his own application, on the expiration of his trust by reason of the arrival of his ward at full age, or his removal from the guardianship.

By sec. 11 [sec. 12] of the above mentioned title of the Revised Statutes, relative to guardians and wards, every guardian of a ward who shall have arrived at full age, and every guardian who shall be superseded in his trust by another guardian, may apply to the surrogate who appointed him, for a citation to his ward, or to such new guardian, to attend the settlement of his accounts; which citation shall be issued by such surrogate, and be served in the manner and at the time herein directed, in case of proceedings for the removal of a guardian.(z)

The application to the surrogate for a citation under this provision, should be by a written petition, setting forth the fact of the arrival of the ward at full age, or of the superseding of the guardian, and the appointment of a new one, and praying a citation to the ward, or to the new guardian, as the case may be. On presenting the petition to the surrogate, an order for the issuing of the citation is made and entered in his minutes, and the citation issues. The citation is directed to the ward, or to the new guardian, according to the fact of the case, as stated in the petition, and requires the party to whom it is directed to appear before the surrogate on a certain day and, attend the settlement of the accounts of the guardian whose trust has expired,

(x) See *ante*, pp. 446, 454-5.

(y) See *ante*, p. 455.

(z) 2 R. S. 152; 4th ed. 335.

or who has been superseded. The citation must be served at least fourteen days before the return day thereof, that being the time directed, as will hereafter appear in the case of proceedings for the removal of a guardian.

On the return day of the citation, the guardian applying for the settlement produces his account, and the vouchers thereof, and the surrogate proceeds to determine the justness and correctness of the same. The proceeding, if the account be disputed, is similar to that hereinbefore described, (a) on the settlement of an account of an executor or administrator on his own application, and also to that above considered, where a guardian is called to account.

In treating of the accounting of executors and administrators in a previous chapter, (b) this work considered in detail the several subjects of the allowance to be made to executors and administrators for trust property perished or lost without their fault; (c) their liability for negligence in collecting or taking care of the trust funds, securities or property; (d) their liability for investments made of trust moneys; (e) their accountability for profits growing out of the trust property, and the allowance to be made to them for the decrease of the same property; (f) their liability for interest on trust funds retained in their hands; (g) the allowance to them of commissions as compensation for their services, the rate and manner of charging the same, (h) and the disallowance of any other charges for compensation for their services; the allowance of their reasonable expenses incurred in the discharge of their trusts; (i) their right to employ agents, accountants, attorneys and counsel, or to set themselves in either of the last two capacities; (j) and the allowance of interest upon sums advanced by them for the purposes of the trust. (k) Guardians are subject to the same law as executors and administrators in respect to these various liabilities and allowances, and the principles stated in the chapter indicated, as governing such liabilities and allowance where an executor or administrator is concerned, extend and apply in all things to the relation of guardian and ward. To avoid a repetition, therefore, the reader is referred to that chapter for the requisite instructions in regard to these several particulars applicable to the accounting of a guardian.

It may be added, that upon the settlement of the accounts of a general guardian, the surrogate is not authorized to make any allowance to such guardian, for services rendered, or expenses incurred by him previous to his appointment as guardian. Such services and expenses are not those of the guardian. And for the services of the guardian, as such, the compensation is limited to the commissions allowed by law.

(a) See *ante*, p. 471 *et seq.*

(b) Chap. 12.

(c) See *ante*, p. 478.

(d) See *ante*, p. 479-81.

(e) See *ante*, p. 482.

(f) See *ante*, pp. 486, 488.

(g) See *ante*, pp. 488, 491.

(h) See *ante*, p. 492. See, also, *supra*, p. 635.

(i) See *ante*, p. 497; also, *supra*, p. 635.

(j) See *ante*, pp. 496-498.

(k) See *ante*, p. 500.

Nor will a promise by the ward, made after coming of age, to pay the guardian for services rendered before the guardianship commenced, authorize the surrogate to allow a charge therefor in the accounts of the guardian. Such a promise might give a right of action in a court of law for personal services, but not a right to charge as guardian. In such a case it would be a promise, after the guardianship ceased, to pay for services rendered before the guardianship commenced. Over such matters the surrogate has no jurisdiction.*(kk)*

As a receipt may be explained, qualified, or even contradicted, by any evidence competent to establish a fact,—so it is erroneous to charge a guardian with the face of a receipt given by him for his ward's property, and with interest on the amount therein specified, from its date, where it appears that he actually received no money, but only land contracts.*(l)*

The hearing on the accounting before the surrogate may be adjourned from day to day, and witnesses may be summoned by subpoena, and be examined on either side before him, touching any of the items of the account, or any disputed question of fact which may arise in the progress of the controversy.

Where, upon the minor arriving at the age of fourteen years, his guardian is superseded in his trust by an order of the surrogate, and a new guardian of the minor is appointed, and proceedings are taken to compel the former guardian to account, the surrogate has the power not only to ascertain and declare the quantity, quality and condition of the ward's property, and the balance due to him from the guardian, but to decree and adjudge the time when, the person to whom, and the manner in which, the same shall be paid or delivered over. And the surrogate has the power to enforce obedience to such a decree by process of attachment against the person; notwithstanding the act to abolish imprisonment for debt.*(m)*

On the conclusion of the proceedings, the surrogate decides upon the questions presented in the case, and a decree is made settling the account of the guardian, and determining the amount of the property of the ward in the hands of the guardian, if any, and ordering the payment of the same to the new guardian, or to the ward, as the case may be. In the Court of Chancery, on the final settlement of the account of a guardian,*(mm)* the decree ordered the bond given by the guardian

(kk) *Clowes v. Van Antwerp*, 4 Barb. S. C. R. 416.

(l) *White v. Parker*, 8 Barb. S. C. R. 48.

(m) *Seaman v. Duryea*, 10 Barb. S. C. R. 523.

(mm) Upon an application to the Court of Chancery to discharge a guardian, and to have his bond delivered up and cancelled, his ward having arrived of age and settled with the guardian:

The Chancellor said it was not the practice of the court to discharge the guardian absolutely, and to order his bond to be given up immediately upon the infant's arriving of age, although he had settled with the guardian. That the ward, notwithstanding such settlement, was entitled to a reasonable time after he became of age to investigate the accounts of the guardian, and to surcharge and falsify the same, if, upon such investigation he found anything wrong. That, by the practice of the Court of Chancery, he was usually allowed one year for that purpose, after he became of age, before the guardian's bond would be cancelled and the guardian absolutely discharged from his trust. That, where the application to the court was made after the expiration of the year, the bond would be delivered up and cancelled immediately, upon the production of the receipt or discharge of the ward, duly proved or acknowledged. But if the application was made within the year, the order would only

to be delivered up and cancelled; and a provision to that effect may, doubtless, be included in the surrogate's decree in the same case. The practice in regard to the settlement of the decree, if any question arise as to the terms and provisions thereof, may be the same as that hereinbefore proposed for the settlement of the decree on an accounting of an executor or administrator.(n)

The decree may be enforced in the same manner as decrees against executors and administrators.(nn) If the decree be for the payment of money, the new guardian or the ward may have an execution thereon, pursuant to the provisions of the 63d, 64th and 65th sections of the law of 1837,(o) as amended by the act of 1844,(p) which were considered, and the practice under which was pointed out, in connection with the kindred subject of enforcing decrees for the payment of money against executors and administrators.(q) The decree may also be enforced by a prosecution of the bond given by the guardian under the direction of the surrogate.(r)

Of the Removal of Guardians by Proceedings before Surrogates.

The only remaining subject to be considered in this connection, is the removal of guardians by proceedings before surrogates.

The following sections of the statutes, taken from the above mentioned third title of the eighth chapter of the second part of the Revised Statutes, concerning guardians and wards, and from the law of 1837, relate to such removals.

Sec. 13. [Sec. 14.] On the application of any ward, or of any relative in his behalf, or of the surety of a guardian, to the surrogate who appointed any guardian, complaining of the incompetency of such guardian, or of his wasting the real or personal estate of his ward, or of any misconduct in relation to his duties as guardian, the surrogate, upon being satisfied by proof of the probable truth of such complaint, shall issue a citation to such guardian, to appear before him at the day and place therein specified, to show cause why he should not be removed from his guardianship.(s)

Sec. 14. [Sec. 15.] Such citation shall be served personally on the guardian to whom it may be directed, at least fourteen days before the return thereof; or, if such guardian shall have absconded or concealed himself, so that such citation cannot be personally served, it may be served by leaving a copy thereof at the last place of residence of such guardian.(t)

Sec. 15. [Sec. 16.] The surrogate, at the day appointed for showing only direct the guardian to be discharged, and that the bond be delivered up and cancelled at the expiration of the year; unless the infant before that time obtained an order to the contrary, or filed with the officer with whom the bond was deposited a caveat, or notice not to deliver up or cancel the bond without the further order of the court. *In the Matter of Van Horne*, 7 Paige, 46. See, also, *Fish v. Miller*, 1 Hoff. Ch. Rep. 266.

(n) See *ante*, p. 544.

(nn) See *ante*, p. 544.

(o) S. L. 1837, 535; 2 R. S. (4th ed.) 421.

(p) S. L. 1844, 91.

(q) See *ante*, p. 545 *et seq.*

(r) See 2 R. S. 151, section 8; *Ante*, p. 545.

(s) 2 R. S. 152; 4th ed. 335.

(t) 2 R. S. 152; 4th ed. 336.

cause, and on such other days as he shall appoint, shall proceed to inquire into the alleged complaint, and shall grant subpoenas to compel the attendance of witnesses to any person applying; and if satisfied of the incompetency or misconduct of such guardian, he may, by an order to be duly entered in his minutes, remove the said guardian from his trust.

Sec. 16. [Sec. 17.] Upon such removal being made, the surrogate may proceed and appoint a new guardian, in the same manner as if no guardian had been appointed.(u)

Sec. 45. The fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth sections of title three, chapter eight, of the second part of the Revised Statutes,(v) shall extend to the case of a guardian who has removed or is about to remove from this state. And in case the guardian has removed from this state, the citation mentioned in the said fifteenth section may be served by publishing the same in the state paper for four weeks.(w)

Sec. 46. Whenever it shall be made to appear to any surrogate that the sureties of any guardian are becoming insolvent, that they have removed or are about to remove from this state, or that for any other cause they are insufficient, and he shall be satisfied that the matter requires investigation, he shall issue a citation to such guardian, requiring him to appear before such surrogate, at a time and place to be therein specified, to show cause why he should not give further sureties, or be removed from his guardianship; which citation shall be served in the same manner as the citation mentioned in the last preceding section is required by that section to be served.

Sec. 47. On the return of the citation, or at such other time as the surrogate shall appoint, he shall proceed to hear the proof and allegations; and if it shall satisfactorily appear that the sureties are for any cause insufficient, the surrogate may make an order requiring such guardian to give further sureties in the usual form, within a reasonable time, to be prescribed by the surrogate.

Sec. 48. If such guardian neglect to give further sureties to the satisfaction of the surrogate, within the time prescribed, the surrogate may, by an order to be duly entered in his minutes, remove such guardian from his trust.

Sec. 49. Sections seventeen, eighteen and nineteen, of title three, of chapter eight, of the second part of the Revised Statutes, shall extend to cases arising under the two preceding sections of this act.(x)

(u) 2 R. S. 153; 4th ed. 336.

(v) The sections above quoted, with the 17th (18th) and 18th (19th,) relating to appeals from decrees of surrogates, upon applications for the appointment or removal of guardians.

(w) S. L. 1837, 532; 2 R. S. (4th ed.) 336-7.

(x) S. L. 1837, 533; 2 R. S. (4th ed.) 337. The 18th and 19th sections referred to are as follows:

Sec. 17. [Sec. 18.] Any person interested in the allowance, or appointment, or removal of a guardian, as next of kin, or otherwise, and any guardian who may have been removed by any surrogate, may, within six months after any order shall have been made by a surrogate for the appointment of a guardian, or for his removal, or refusing to make such removal, appeal to the Chancellor, who shall make such order for notifying the adverse party, and for correcting any such proceedings, as he may deem just.

Sec. 18. [Sec. 19.] But no appeal made by a guardian, from the order of a surrogate removing him, shall in anywise affect such order until the same be reversed; 2 R. S. 153.

Sec. 50. Where a guardian shall be removed pursuant to the afore-said section, he may be required to account immediately, pursuant to the eleventh section of said title,^(y) and application for such account may be made by any new guardian of the minor as well as by the persons mentioned in the said eleventh section.

The application to the surrogate under either of the above provisions of the statute should be in writing, and should set forth the facts upon which the complaint of incompetency, waste or misconduct against the guardian is founded, or the fact of his removal from the state, or that he is about so to remove, or any of the circumstances relative to his sureties specified in the 46th section of the law of 1837; and should pray a citation to the guardian for him to show cause, either why he should not be removed from his guardianship, or why he should not give further sureties or be removed according to the grounds of the application. The petition should be under oath, and on presenting the same, the surrogate, if he be satisfied by the proof thus furnished of the probable truth of the complaint, or that the matter requires investigation, upon an order entered in his minutes, issues a citation to the guardian pursuant to the section of the statute under which the application is made.

On the return of the citation, if the parties appear, the hearing takes place as in the usual case. If the incompetency, waste or misconduct complained of, or the fact of the removal of the guardian from this state, or that he is about so to remove, be proved, the surrogate makes his order removing the guardian from his trust.

Fixed habits of intemperance constitute a sufficient reason for the removal of a guardian; and where the wife of a person of such habits was also a guardian with him, it was held improper that she should be the guardian, she being subject to his control.^(z)

Where the guardian entered into a speculation with the husband of his ward, who was also an infant, in relation to her estate, and obtained a mortgage thereon from both, the court removed the guardian from his trust, and ordered the mortgage to be delivered up and cancelled.^(a)

The Court of Chancery, it was held, had concurrent jurisdiction with a surrogate in removing a guardian appointed by the latter, for the causes specified in the Revised Statutes on that subject; but the surrogate had no jurisdiction to remove or discharge a guardian appointed by the Court of Chancery, or to compel such guardian to account, either before or after his removal by the court appointing him.^(b)

If the application be made on the ground of the insolvency, or the removal, or the intention to remove from this state, of the surety or sureties of the guardian, and the charges in respect thereto be proved, the surrogate makes an order requiring the guardian to give further sureties in the usual form within a reasonable time, commonly five days; and if the guardian neglect to comply with such order, the surrogate orders his removal from his trust.

(y) See *supra*, p. 638; 2 R. S. (4th ed.) 337.

(z) *Ketlelas v. Gardner*, 1 Paige, 488.

(a) *In the Matter of Cooper*, 2 Paige, 34.

(b) *In the Matter of Dyer*, 5 Paige, 534.

It has already appeared, in that chapter of this work treating of the removal of executors and administrators, that by sec. 34 of the law of 1837,(c) whenever it shall appear to the surrogate that letters of administration or letters of guardianship have been granted on or by reason of false representations made by the person to whom the same were granted; and also, whenever it shall appear that an administrator or guardian has become incompetent by law to act as such, by reason of drunkenness, improvidence, or want of understanding, the surrogate shall have power to revoke such letters. And in case a woman marries after being appointed an executrix, administratrix or guardian, the surrogate, on the application of any person interested, shall have power to revoke such appointment. And that, by the 35th section of the same law,(d) whenever it shall appear that the penalty of the bond taken from an executor, administrator or guardian, is inadequate in amount, the surrogate shall have power to make an order requiring him to give additional security for the faithful performance of his duty as such executor, administrator or guardian; and that, in case of non-compliance with such order, the surrogate may revoke the letters granted to him.

The proceedings, under these provisions, for the removal of executors and administrators, were also, in that chapter, considered and pointed out. It is sufficient in this place to state, that the same practice is to be followed in the case of a like proceeding against a guardian, and to refer the reader to the observations made and the directions given in the chapter indicated, for the proper instructions applicable to the latter case.

It also appeared, in connection with the subject of the removal of executors and administrators, that by the 61st section of the law of 1837,(e) whenever any surrogate shall issue a citation to any administrator, executor or guardian, requiring him to show cause why he should not be removed from office, the surrogate shall have power to enter an order enjoining such executor, administrator or guardian, from further acting in the premises, until the matter in controversy shall be disposed of; and the practice, on procuring an injunction against an executor or administrator, was there described. It is necessary only to add, in this place, that the same practice is to be followed in the like case in procuring an injunction against a guardian.

Of the Resignation by Guardians of their trusts.

The following sections of the statute make provision for the resignation by a guardian of his trust to a surrogate.

Sec. 51. Any guardian may apply to the surrogate by whom he was appointed, for liberty to resign his trust, setting forth the reasons why the application is made, and verifying the same by his own oath or otherwise.(f)

Sec. 52. Such surrogate, in his discretion, may thereupon issue a citation to the ward, requiring him to appear at a time and place to be

(c) See *ante*, p. 602; S. L. 1837, 530.

(d) See *ante*, p. 603; S. L. 1837, 530.

(e) See *ante*, p. 596; also p. 601; S. L. 1837, 535.

(f) S. L. 1837, 533; 2 R. S. (4th ed.) 337.

therein mentioned, and show cause why the guardian should not be at liberty to resign his trust. The citation shall be served by delivering a copy to the ward at least ten days before the return day thereof. Notice of the proceeding shall also be given to the next of kin of the ward, if there be any, of the age of discretion, in the county of the surrogate.

Sec. 53. On the return of the citation and proof of the service of the notice, the surrogate shall appoint some discreet and competent person to appear and attend to the interests of the ward in the premises, who shall consent, in writing, to such appointment. Any other [person] who shall be desirous to do so, may also appear on behalf of the ward.

Sec. 54. The guardians shall then proceed to render to the surrogate a full, just and true account, in writing, of all his receipts and payments on account of the ward, and of all the books, papers, moneys, choses in action and other property of the ward, which may be in the hands or under the control of the guardian; and shall verify the same by his own oath, and such other evidence as shall be satisfactory to the surrogate.

Sec. 55. If the surrogate shall be satisfied that the guardian has in all respects conducted himself honestly in the execution of his trust; that he has rendered a full, just and true account, and that the interest of the ward would not be prejudiced by allowing the guardian to resign his trust, he may thereupon proceed in the mode prescribed by law, to appoint a new guardian for such ward, and order that his former guardian deliver over all the books, papers, moneys, choses in action, or other property of the ward, to such new guardian, and take duplicate receipts for the same.

Sec. 56. On delivering one of the said receipts to the surrogate to be filed in his office, the surrogate may enter an order that the former guardian, on his own application, has been permitted to resign his trust, and that he is thereupon discharged from any further custody or care of the ward or of his estate. But nothing herein contained shall preclude the ward or his new guardian from having a further account from such former guardian, in relation to all matters connected with his trust before he was permitted to resign the same; and in relation to all such matters, the sureties of the former guardian shall remain liable in the same manner, and to the same extent, as though such order had not been made.(g)

The practice under these sections, and the principles which apply to the accounting therein mentioned, will readily be gathered from the provisions of the sections themselves, and from the instructions and directions embraced in the preceding pages of this chapter.

APPENDIX OF FORMS.

No. 1. Page 144.(a)

PETITION TO PROVE WILL.

County of New York, }
Surrogate's Court. }

To ALEXANDER W. BRADFORD, Surrogate of the County of New York :

The petition of Philip Thompson, of the city of New York, respectfully sheweth :

That James Thompson, late of the city of New York, merchant, departed this life in the said city, on the tenth day of April, in the year 1855, having previously, as your petitioner is informed and believes, duly made and executed his last will and testament. That your petitioner is one of the executors named in the said will. That the said deceased was a citizen of the United States. That he was at or immediately previous to his death, an inhabitant of the county of New York, and that his said last will and testament relates to both real and personal estate.

Your petitioner further shows, that the heirs and next of kin of the said James Thompson, deceased, are William Thompson, Samuel Thompson, and your petitioner, all residing in the city of New York, Henrietta Wilson, wife of Alexander Wilson, residing in the city of Albany, in the state of New York, and Mary Jackson, wife of William Jackson, residing in the city of Detroit, in the state of Michigan, all of full age, and Charles Thompson and Henry Thompson, residing in the said city of New York, both minors, having no general guardian, his only surviving children, and Mary Jones and James Jones, residing in the city of New York, both minors, and of whose persons and estates Edward Jones, residing in the city of New York, is the general guardian, the only children of Sarah Jones, deceased, who was a daughter of the said James Thompson, deceased.

That Cornelia Thompson, residing in the city of New York, of full age, is the widow of the said James Thompson, deceased.

Your petitioner further shows, that he is informed and believes, that the surrogate of the county of New York has jurisdiction to take the proof of the said last will and testament, and over the executors thereof, and the power of granting letters testamentary thereof, with all powers incidental thereto, and that he is desirous that such proof should be taken and such letters granted, and that such further or other proceedings in the premises should be had, as may be legal and proper.

Your petitioner therefore prays, that a citation may issue out of, and under the seal of this court, to be directed to the proper persons, pursuant to the statute in such case made and provided, requiring them, and each of them, at such time and place as shall be in the said citation mentioned, to appear and attend the probate of the said last will and testament, and that such further or other proceedings in the premises should be duly had, as may be requisite to the proving and recording of the said last will and testament, and the granting probate and letters testamentary thereof. And your petitioner will ever pray, &c.

Dated, this twentieth day of April, 1855.(b)

PHILIP THOMPSON.

(a) These pages refer to the body of the work.

(b) The following is a short form of this petition, in use in the court of the surrogate of the county of New York :

County of New York, }
Surrogate's Court. }

To ALEXANDER W. BRADFORD, Surrogate of the County of New York :

The petition of Charles Smith, of the city of New York, respectfully sheweth, that your petitioner is sole executor named in the last will and testament of William Smith, late of the city of New York, carpenter, de-

Jurat. (See page 144.)

State of New York, }
County of New York. } ss.

On this twentieth day of April, in the year one thousand eight hundred and fifty-five, personally appeared before me, Philip Thompson, the petitioner named in the foregoing petition, who being by me duly sworn, did depose and say, that he had read the foregoing petition by him subscribed, and knew the contents thereof, and that the same was true of his own knowledge, excepting as to the matters therein stated on his information and belief, and as to those matters he believed it to be true.

A. W. BRADFORD, *Surrogate.*

No. 2. P. 144.

CONSENT TO BE APPOINTED AND TO SERVE AS SPECIAL GUARDIAN.

Surrogate's Court—County of New York.

IN THE MATTER OF PROVING THE LAST
WILL AND TESTAMENT
OF
JAMES THOMPSON, DECEASED.

I, DAVID R. JAKUES, of the city of New York, attorney at law, do hereby consent to be appointed by the surrogate of the county of New York, the special guardian for Charles Thompson and Henry Thompson, minors, two of the heirs and next of kin of James Thompson, deceased, for the sole purpose of taking care of the interests of the said minors in the matter of proving the last will and testament of the said deceased, and I consent to serve as such special guardian.

Dated, this twentieth day of April, 1855.

DAVID R. JAKUES.

No. 3. P. 144.

ORDER APPOINTING A SPECIAL GUARDIAN.

At a Surrogate's Court, held in and for the county of New York, at the surrogate's office in the city of New York, on the twentieth day of April, in the year one thousand eight hundred and fifty-five.

Present—ALEXANDER W. BRADFORD, *Surrogate.*

IN THE MATTER OF PROVING THE LAST
WILL AND TESTAMENT
OF
JAMES THOMPSON, DECEASED.

It appearing from the petition of Philip Thompson, propounding the last will and testament of James Thompson, late of the city of New York, deceased, for probate, that Charles

ceased. That the said deceased was, at or immediately previous to his death, an inhabitant of the county of New York, and departed this life in the city of New York, on the third day of January last past, and that his said last will and testament relates to both real and personal estate.

Your petitioner further shows, that the heirs and next of kin of the said William Smith, deceased, are Henry Smith and your petitioner, his brothers, and Sarah Smith, his sister, all of full age, and all residing in the city of New York.

That the said deceased left no widow him surviving. Your petitioner therefore prays, that said last will and testament may be proved, and letters testamentary granted thereon according to law.

CHARLES SMITH.

City and County of New York, ss.—I, Charles Smith, the petitioner named in the foregoing petition, being duly sworn, do depose and say, that I have read the foregoing petition, to which I have subscribed my name, and know the contents thereof, and that the matters of fact therein stated are true, and that the matters therein stated of my information and belief I believe to be true.

Sworn this third day of February,
1855, before me,
A. W. BRADFORD, *Surrogate.*

CHARLES SMITH.

Thompson and Henry Thompson, two of the heirs and next of kin of the said deceased, are minors, having no general guardian; and on reading and filing the consent of David R. Jaques, of the city of New York, attorney at law, to be appointed and to serve as the special guardian for the said minors, for the sole purpose of taking care of their interests in this matter: It is ordered, that the said David R. Jaques be, and he hereby is appointed the special guardian for the said Charles Thompson and Henry Thompson, to take care of their interests in this matter.

No. 4. P. 145.

ORDER FOR ISSUING CITATION.

*Title. (See No. 3.)**At, &c. (See No. 3.)*

On reading and filing the petition of Philip Thompson, propounding the last will and testament of James Thompson, late of the city of New York, deceased, for probate: It is ordered, that a citation issue to the proper persons, pursuant to the prayer of the said petition, requiring them to appear in this court, on the third day of June next, at ten o'clock in the forenoon of that day, and attend the probate of the said will.

No. 5. P. 146.

CITATION TO PROVE WILL.

The People of the State of New York,

To Cornelia Thompson, William Thompson, Samuel Thompson, Edward Jones, the general guardian of the persons and estates of Mary Jones and Philip Jones, minors, and David R. Jaques, the special guardian for Charles Thompson and Henry Thompson, minors, severally residing in the city of New York, Alexander Wilson and Henrietta Wilson, his wife, residing in the city of Albany, in the state of New York, and William Jackson, and Mary Jackson, his wife, residing in the city of Detroit, in the state of Michigan, send greeting:

Whereas, Philip Thompson, of the city of New York, has lately applied to our surrogate of the county of New York, for the proof of the will of James Thompson, late of the city of New York, merchant, deceased, which said will relates to both real and personal estate: Therefore, you, and each of you, are cited and required to appear at the office of the said surrogate, in the city of New York, on the third day of June next, at ten o'clock in the forenoon of that day, and attend the probate of the said will,

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, Alexander W. Bradford, surrogate of the county of New York, at the surrogate's office in the city of New York, this twentieth day of April, in the year one thousand eight hundred and fifty-five.

ALEXANDER W. BRADFORD, *Surrogate*(c)

No. 6. P. 146.

PROOFS OF SERVICE OF CITATION.

City and County of New York, ss.—John Smith, of the city of New York, clerk, being duly sworn, doth depose and say, that he served the foregoing citation on the seventeenth day

(c) The following is the form of the citation commonly in use:—

The People of the State of New York, by the grace of God, free and independent:

To Henry Smith and Sarah Smith, residing in the city of New York, heirs and next of kin of William Smith, deceased, send greeting:—

Whereas, Charles Smith, of the city of New York, has lately applied to our surrogate of the county of New York, to have a certain instrument in writing, bearing date the twenty-eighth day of December, in the year 1853, relating to both real and personal estate, duly proved as the last will and testament of William Smith, late of the city of New York, deceased: Therefore, you and each of you are cited and required, personally, to be and appear before our said surrogate, at his office in the city of New York, on the seventh day of December next, at ten o'clock in the forenoon of that day, then and there to attend to the probate of the said last will and testament.

In testimony whereof, the surrogate of our said county has hereunto affixed his seal of office, the twentieth day of October, in the year of our Lord one thousand eight hundred and fifty-four, and of our Independence the seventy-ninth.

A. W. BRADFORD, *Surrogate*.

of May, instant, on Cornelia Thompson, Edward Jones, the general guardian, and David R. Jaques, the special guardian therein named, by delivering a copy thereof to each of them personally, and on the twenty-first day of May, instant, on William Thompson, therein named, by leaving a copy thereof for him, at his residence, with a female of suitable age and discretion, belonging to his family, who stated that he was absent, but that she expected him at home in a short time, and would deliver the said copy to him.

Sworn this thirtieth day of May, }
A. D. 1855, before me, }

JOHN SMITH.

THOMAS WARD, *Commissioner of Deeds.*

County of Albany, }
City of Albany. } ss.

James Brown, of the city of Albany, clerk, being duly sworn, doth depose and say, that on the fifteenth day of May, instant, he served the foregoing citation on Henrietta Wilson, therein named, by leaving a copy thereof for her, at her residence, with a person of suitable age and discretion, who stated that she was engaged, and could not see this deponent, and that he would hand the said copy to her immediately.

Sworn this twenty-ninth day of }
May, A. D. 1855, before me, }

JAMES BROWN.

EDWARD SIMPSON, *Commissioner of Deeds.*

ADMISSION OF SERVICE OF CITATION. (See p. 146.)

ON THE BACK OF THE CITATION.

I, Alexander Wilson, named in the foregoing citation, do hereby admit due and personal service of the said citation.

Dated this twenty-seventh day of May, 1855.

ALEXANDER WILSON.(d)

County of Albany, }
City of Albany. } ss.

Henry Day, of the city of Albany, being duly sworn, doth depose and say, that on the twenty-seventh day of May, instant, he saw Alexander Wilson, named in the foregoing citation, to him personally known, sign the foregoing admission of service of the said citation.

Sworn this thirtieth day of May, }
1855, before me, }

HENRY DAY.

CALEB HILTON, *Judge of Albany County Courts.*

PROOF OF PUBLICATION OF CITATION.

State of New York, }
City and County of Albany. } ss.

Philo K. Cole, of the city of Albany, being duly sworn, doth depose and say, that he is the foreman in the office of the Albany Evening Journal, the paper published by the printer to the state, and that the citation of which the annexed is a printed copy, has been regularly published in the said Albany Evening Journal, once in each week, for six weeks successively, commencing on the twenty-second day of April last past.

Sworn this twenty-ninth day of }
May, 1855, before me, }

PHILO K. COLE.

URIAH COX, *Commissioner of Deeds.*

(d) If the admission of service be not indorsed on the original citation, the citation should, of course, be sufficiently described in the admission. It is understood that in the court of the surrogate of the county of New York, at present, on proving a will of real estate, proof, by affidavit, of the service of the citation on all the heirs, is absolutely required, and admissions or appearances of the parties are not allowed in the place of the same.

FORMS ON PROVING WILLS.

V

No. 7. P. 148.

FORM OF ENTRY OF APPEARANCES AND ORDER OF ADJOURNMENT, AND FOR THE ISSUING OF A FURTHER CITATION WHERE THERE HAS BEEN AN OMISSION TO SERVE ANY OF THE PARTIES WITH THE FIRST CITATION.

At a Surrogate's Court, held in and for the county of New York, at the surrogate's office in the city of New York, on the third day of June, [*the return day of the first citation,*] in the year one thousand eight hundred and fifty-five.

Present—ALEXANDER W. BRADFORD, *Surrogate*.

IN THE MATTER OF PROVING THE LAST
WILL AND TESTAMENT
OF
JAMES THOMPSON, DECEASED.

This matter having come on upon the return of the citation heretofore issued therein to the proper persons, requiring them to appear in this court on this day, and attend the probate of the last will and testament of James Thompson, late of the city of New York, deceased, and Philip Thompson, one of the executors named in the said will, and the petitioner herein having appeared in person, and by Charles Conner, his counsel, in support of the proof of the said will, and Cornelia Thompson, the widow of the said deceased, having appeared by George Lord, her counsel, to contest the said proof, and no other person or party having appeared in the said matter, and the said citation not having been served on Samuel Thompson, residing in the city of New York, therein named; on motion of the said counsel for the petitioner, it is ordered that this matter stand adjourned to the seventeenth day of June, instant, at ten o'clock in the forenoon of that day, and that a further citation issue therein, to be directed to the said Samuel Thompson, requiring him to appear in this court, on the said seventeenth day of June, instant, at ten o'clock in the forenoon, and attend the probate of the said will.

The further citation, and proof of service thereof, will be similar in form to Nos. 5 and 6, *ante*.

No. 8. P. 149.

PETITION TO PROVE A WILL IN A CASE NOT REQUIRING A CITATION TO BE ISSUED.

County of New York, }
Surrogate's Court. }

TO ALEXANDER W. BRADFORD, Surrogate of the County of New York:

The petition of Mary Jackson and William Jackson, both of the city of New York, respectfully sheweth—

That James Jackson, late of the city of New York, carpenter, departed this life in the said city, on the twenty-first day of April, instant, having previously duly made and executed, as your petitioners are informed and believe, his last will and testament, and that your petitioner, Mary Jackson, is the sole executrix named in the said last will and testament.

That the said deceased was, at or immediately previous to his death, an inhabitant of the county of New York, and that his said last will and testament relates exclusively to personal estate.

Your petitioners further show, that your petitioner, Mary Jackson, residing in the city of New York, is the widow of the said deceased, and that Jane Jackson, and your petitioner, William Jackson, both residing in the said city, are his only children, and only next of kin. That your said petitioner, William Jackson, is of full age, and that the said Jane Jackson is a minor, having no general guardian.(e)

Your petitioners further show, that they are informed and believe, that the surrogate of the county of New York, has jurisdiction to take the proof of the said last will and testa-

(e) It should be stated that in the county of New York, the surrogate will not allow proof of a will in this form where there are minor heirs or next of kin.

ment, and over the executors thereof, and the power of granting letters testamentary thereof, with all powers incidental thereto, and that they are desirous that such proof should be taken, and such letters granted, and that such further or other proceedings in the premises should be had, as may be legal and proper. And for as much as your petitioner, Mary Jackson, is the widow, and your petitioner, William Jackson, and the said Jane Jackson, are the only next of kin of the said James Jackson, deceased, your petitioners pray, that your Honor will be pleased forthwith to appoint a special guardian for the said Jane Jackson, to take care of her interest in the premises; and that, upon the due appearance of such special guardian to take care of such interest, your Honor will be pleased to proceed immediately to the necessary examinations for proving the said last will and testament, or that such further or other proceedings in the premises should be duly had, as may be requisite to the proving and recording of the said last will and testament, and the granting probate and letters testamentary thereof.

And your petitioners will ever pray, &c.

Dated this twenty-fourth day of April, A. D. 1855.

MARY JACKSON.

WILLIAM JACKSON.

The jurat to this petition will be similar to that in No. 1.

The consent to serve as special guardian, and the order of appointment, will be like those at Nos. 2 and 3.

WAIVER AND CONSENT OF SPECIAL GUARDIAN. (See p. 149.)

Surrogate's Court—County of New York.

IN THE MATTER OF PROVING THE LAST
WILL AND TESTAMENT
OF
JAMES JACKSON, DECEASED.

I, Henry De Witt, of the city of New York, attorney at law, the special guardian for Jane Jackson, one of the next of kin of James Jackson, late of the city of New York, deceased, duly appointed by the surrogate of the county of New York, to take care of her interest in the matter of proving the last will and testament of the said deceased, do hereby waive the issuing and service upon me of a citation to attend the probate of the said last will and testament, and consent to the immediate examination of witnesses in this matter. (ee)

Dated, this 24th April, 1855.

HENRY DE WITT.

ORDER FOR IMMEDIATE PROOF. (See p. 149.)

Title. (See No. 3.)

At, &c. (See No. 3.)

On reading and filing the petition of Mary Jackson and William Jackson, propounding the last will and testament of James Jackson, late of the city of New York, deceased, for probate, whereby it appears that the said Mary Jackson is the widow, and that Jane Jackson, residing in the city of New York, a minor, having no general guardian, and the said William Jackson, are the only next of kin of the said deceased, and on reading and filing the stipulation, in writing, of Henry De Witt, Esquire, the special guardian duly appointed to take care of the interests of the said minor in the premises, waiving the issuing and service upon him of a citation to attend the probate of the said last will and testament, and consenting to the immediate examination of witnesses in this matter. It is ordered, pursuant to the prayer of the said petition, that the examination of the witnesses in this matter be immediately proceeded with.

No. 9. P. 150.

MINUTE OF ISSUING SUBPÆNA.(f)

Title. (See No. 3.)

At, &c. (See No. 3.)

Philip Thompson, the petitioner herein, having applied for a subpoena to Clinton Marshall

(ee) See Note (a), No. 8.

(f) See 2 E. S. 222, (4th ed. 420, 421,) sec. 7, subdv. 4; *Ands*, chap. 1, p. 26, subdv. 2.

and James Clarke, as witnesses in this matter, it is ordered that a subpoena issue accordingly, returnable the seventeenth day of June, instant, at ten o'clock in the forenoon.

SUBPŒNA TO WITNESSES.

• *County of New York, ss.*—The People of the State of New York, to Clinton Marshall and James Clark, greeting:—

We command you, that all business and excuses being laid aside, you and [SEAL.] each of you, personally appear and attend before our surrogate of the county of New York, at his office in the city of New York, on the seventeenth day of June, instant, at ten o'clock in the forenoon of that day, to testify and give evidence in the matter of proving the last will and testament of James Thompson, late of the city of New York, deceased, now pending before our said surrogate. And for a failure to attend, you will be deemed guilty of a contempt of court, and be responsible to the aggrieved party for the loss and hindrance sustained by such failure, and for all other damages sustained thereby, and will forfeit, to such aggrieved party, fifty dollars, in addition to such damages.

Witness, Alexander W. Bradford, surrogate of our said county of New York, at the city of New York, this twelfth day of June, in the year one thousand eight hundred and fifty-five, and of our independence, the seventy-ninth.

CHARLES CONNER, *Proctor.*

ALEXANDER W. BRADFORD, *Surrogate.*

ORDER THAT ATTACHMENT ISSUE AGAINST A WITNESS FOR DISOBEDIENCE TO A SUBPŒNA.

Title. (See No. 3.)

At, &c. (See No. 3.)

The subpoena heretofore issued in this matter to Clinton Marshall and James Clark, requiring them, and each of them personally to appear and attend in this court, on this day, at ten o'clock in the forenoon, to testify and give evidence in this matter, having been duly and personally served on the said Clinton Marshall, and his legal fees, as a witness, having been paid to him, as appears by the affidavit of James Gray, duly filed herein, proving such service and payment by him, and the said Clinton Marshall having failed to appear according to the exigency of the said subpoena, on motion of Mr. Charles Conner, of council for the petitioner herein, it is ordered that a warrant issue to the sheriff of the city and county of New York, to attach the said Clinton Marshall, and to bring him forthwith personally before this court, to answer for his contempt in not obeying the said subpoena, and to detain him in his custody until he shall be duly discharged.(g)

ATTACHMENT FOR DISOBEDIENCE TO A SUBPŒNA.

The People of the State of New York, to the sheriff of the city and county of New York, greeting:—

We command you to attach Clinton Marshall, if he shall be found in your bailiwick, and bring him forthwith personally before our surrogate of the county of New York, to answer unto us for certain trespasses and contempts against us, in not obeying our writ of subpoena, issued in due form of law by our said surrogate, to him directed, and on him duly and personally served, and his legal fees as a witness paid him, commanding him personally to appear and attend before our said surrogate, at his office in the city of New York, on the seventeenth day of June, instant, at ten o'clock in the forenoon, to testify and give evidence in the matter of proving the last will and testament of James Thompson, late of the city of New York, deceased, now pending before our said surrogate; and you are further commanded to detain him in your custody, until he shall be discharged by our said surrogate; and have with you this writ.

Witness, Alexander W. Bradford, surrogate of our county of New York, at the surrogate's office, in the city of New York, this seventeenth day of June, in the year one thousand eight hundred and fifty-five.

CHARLES CONNER, *Proctor.*

A. W. BRADFORD, *Surrogate.*

(g) "In all orders," says Mr. Kirtland, in his *Treatise*, "whereon a warrant or attachment is to be issued, the grounds upon which the order is made, and the attachment or warrant issued, ought to be inserted in them respectively; and the practice of the Court of Chancery, and courts of general powers, will not be justified in a surrogate, who acts by special and limited powers." *Kirt. Surr.* 88.

REQUEST FOR THE EXAMINATION OF WITNESSES. (See p. 28.)

Title. (See No. 3.)

The subscriber, the widow of James Thompson, late of the city of New York, deceased, contesting the proof of the will of the said James Thompson, deceased, now pending before the surrogate of the county of New York, hereby makes her request in writing to the said surrogate, that all the witnesses to the said will be examined, and that Thomas Porter and John Corning, residing in the city of Albany, merchants, also be examined as witnesses on the part of the subscriber, in opposition to the proof aforesaid. Dated, this seventeenth day of June, 1855.

CORNELIA THOMPSON.

GEORGE LORD,

Of Counsel for Cornelia Thompson.

To Alexander W. Bradford, Esqr., Surrogate of the county of New York.

The affidavit to obtain the order for the examination in another county, of a sick or disabled witness residing in such county, should set forth his residence, the necessity for his examination according to the advice of counsel, and the improbability of procuring his attendance before the original surrogate.

ORDER FOR THE EXAMINATION OF SICK OR DISABLED WITNESSES RESIDING IN ANOTHER COUNTY OF THIS STATE. (See p. 29.)

*Title. (See No. 3.)**At, &c. (See No. 3.)*

This matter having come on to be heard on the return of the citations, duly issued to the proper persons, requiring them to appear in this court, and attend the probate of the last will and testament of James Thompson, late of the city of New York, deceased, and Philip Thompson, one of the executors named in the said last will and testament, having appeared in person, and by Charles Conner, his proctor and counsel in support of the proof thereof, and Cornelia Thompson, the widow of the said deceased, and having the right to contest the said proof, having appeared by George Lord, her proctor and counsel, to contest the same, and David R. Jaques, the special guardian for Charles Thompson and Henry Thompson, minors, interested in the said matter, having also appeared, and no other party or person having appeared in the said matter, and the said matter having been heard and duly adjourned from day to day, until this day, and all the witnesses therein, other than those hereinafter mentioned, having been examined, and the said Cornelia Thompson having duly filed her request in writing that all the witnesses to the said will be examined, and that Thomas Porter and John Corning, residing in the city of Albany, merchants, also be examined as witnesses on her part, in opposition to the proof aforesaid; and it having been satisfactorily proved that James Clark, one of the subscribing witnesses to the said last will and testament, and the said Thomas Porter and John Corning reside in the city of Albany, and that they are, and each of them is infirm, and that it is not probable that their, or either of their attendance in this court can be procured within a reasonable time, and that the testimony of the said Thomas Porter and John Corning is material in this matter: On motion of Mr. George Lord, of counsel for the said Cornelia Thompson, it is ordered and directed, that the said James Clark, Thomas Porter and John Corning be examined before Esquire, surrogate of the county of Albany, and that a certified copy of this order under the seal of this court, together with the said will, be delivered to the said surrogate of the county of Albany on or before Monday, the first day of July next. And it is further ordered, that this matter stand adjourned to the day of August next, at ten o'clock in the forenoon.

I, Alexander W. Bradford, surrogate of the county of New York, do hereby certify, that the foregoing is a true copy of an order made by me in the matter of proving the last will and testament of James Thompson, late of the city of New York, deceased, now pending before me.

In testimony whereof, pursuant to the statute in such case made and provided, I have hereunto affixed my seal of office, at the surrogate's office in the city of New York, this nineteenth day of June, in the year one thousand eight hundred and fifty-five.

[SEAL.]

A. W. BRADFORD.

NOTICE OF EXAMINATION OF WITNESSES. (See p. 29.)

Surrogate's Court—County of New York.

IN THE MATTER OF PROVING THE LAST
WILL AND TESTAMENT
OF
JAMES THOMPSON, DECEASED.

You will please to take notice, that James Clark, one of the subscribing witnesses to the last will and testament of James Thompson, late of the city of New York, deceased, and Thomas Porter and John Corning, will be examined as witnesses in this matter, before Esquire, surrogate of the county of Albany, at the office of the said surrogate in the city of Albany, on the sixteenth day of July, instant, at ten o'clock in the forenoon of that day.

Dated, this first day of July, 1855.

GEORGE LORD,
*Proctor for Cornelia Thompson, contesting
the proof of the said will.*

TO PHILIP THOMPSON,
DAVID R. JAKES, Esq., *Special Guardian, &c.*

No. 11. P. 159.

AFFIDAVIT FOR COMMISSION.

Title. (See No. 3.)

City and County of New York, ss.—Philip Thompson, of the city of New York, being duly sworn, doth depose and say, that he is one of the executors named in the last will and testament of James Thompson, late of the city of New York, deceased, and the petitioner herein supporting the proof of the said will. That he has disclosed to Charles Conner, Esquire, his counsel in this matter, the facts which he expects to prove in the said matter, by Nelson Brown, of the city of Mobile, in the state of Alabama, and that the said Nelson Brown is a material witness in support of the proof of the said will, as he is advised by his said counsel, and verily believes. That the said Nelson Brown does not reside within the state, but resides in the city of Mobile, in the state of Alabama, aforesaid.

Sworn this seventeenth day of June,
1855, before me,

PHILIP THOMPSON.

JAMES COWDREY, *Commissioner of Deeds.*

NOTICE OF APPLICATION FOR A COMMISSION.

Title. (See No. 2.)

Please to take notice, that on the affidavit, of which the annexed is a copy, an application will be made to the surrogate of the county of New York, at his office in the city of New York, on the thirtieth day of June instant, at ten o'clock in the forenoon of that day, for an order that a commission issue in this matter, to be directed to Jacob Barnard, counsellor at law, John Harris, merchant, and Henry Lawrence, gentleman, all residing in the city of Mobile, in the state of Alabama, authorizing them, or any two of them, to examine on oath Nelson Brown, residing in the said city of Mobile, as a witness, in support of the proof of the will of James Thompson, deceased, now pending before the said surrogate, on interrogatories to be annexed to the said commission, in which any party to this matter will be at liberty to join.

Dated this nineteenth day of June, 1855.

Yours, &c., CHARLES CONNER, *Proctor for Easr.*

TO CORNELIA THOMPSON.

DAVID R. JAKES, Esq., *Guardian ad litem.*

ORDER FOR COMMISSION.

Title. (See No. 3.)

At, &c. (See No. 3.)

On reading and filing the affidavit of Philip Thompson, the executor of the said last will and testament, and the petitioner herein, together with notice of motion for a commission,

APPENDIX.

and proof of due service on the other parties to this matter, and no one appearing to oppose, and on motion of Charles Conner, of counsel for the said executor, it is ordered, that a commission issue out of and under the seal of this court, to be directed to Jacob Barnard, counsellor at law, John Harris, merchant, and Henry Lawrence, gentleman, all residing in the city of Mobile, in the state of Alabama, authorizing them, or any two of them, to examine on oath, upon interrogatories to be annexed to the said commission, Nelson Brown, residing in the said city of Mobile, as a witness in support of the proof of the said last will and testament, and that any of the parties to this matter have leave to join in the said commission, and that the same may be returned by mail, addressed to the surrogate of the county of New York.

No. 12. P. 159.

COMMISSION TO EXAMINE FOREIGN WITNESSES.

The People of the State of New York to Jacob Barnard, counsellor at law, John Harris, merchant, and Henry Lawrence, gentleman, all residing in the city of Mobile, in the state of Alabama, send greeting:

Know ye, that we, with full faith in your prudence and competency, have appointed you commissioners, and by these presents do authorize you, or any two of you, to examine [SEAL.] amine Nelson Brown, residing in the said city of Mobile, as a witness in the matter of proving the last will and testament of James Thompson, late of the city of New York, deceased, now pending before our surrogate of the county of New York, in support of the proof of the said will, on oath, upon the interrogatories annexed to this commission, to take and certify the depositions of the said witness, and return the same, according to the directions hereunto annexed.

Witness, Alexander W. Bradford, surrogate of our county of New York, at the surrogate's office in the city of New York, this thirteenth day of June, in the year one thousand eight hundred and fifty-five.

A. W. BRADFORD.

CHARLES CONNER, *Proctor for Executor.*

The proper directions for the execution of the commission should accompany the same, in accordance with the provisions of the Revised Statutes. (2 R. S. 393.)

No. 13. P. 159.

FORM OF INTERROGATORIES TO BE ANNEXED TO A COMMISSION FOR THE EXAMINATION OF A SUBSCRIBING WITNESS.

Interrogatories to be administered to W. P. J. and A. N. Z., witnesses to be produced, sworn and examined before R. H. G., commissioner, in the city of Washington, in the District of Columbia, in the matter of proving the last will and testament of H. B., late of the city of New York, single woman, deceased, now pending before the surrogate of the county of New York, under and in pursuance of the commission hereto annexed.

First Interrogatory.—What is your name, age and occupation, business or profession, and where do you reside?

Second Interrogatory.—Were you acquainted with James Thompson, late of the city of New York, deceased? State how long and how intimately you were acquainted with him. Where and when did he die?

Third Interrogatory.—Look at the instrument in writing hereunto annexed, bearing date the eighth day of January, in the year 1844, purporting to be the last will and testament of the said James Thompson, and say whether or not you were present at the time of the execution of the same? If so, where? State particularly what took place at the execution of the said instrument? Who was present? What was done and said, and by whom.

Fourth Interrogatory.—Was anything said in regard to the witnessing the execution of the said instrument, and by whom, and who were present?

Fifth Interrogatory.—What was done with regard to witnessing the execution of the said instrument, and in whose presence?

Sixth Interrogatory.—What was the condition of H. B. as regards the soundness or unsoundness of her mind at the time the instrument was executed?

Seventh Interrogatory.—What was H. B's age.

Eighth Interrogatory.—Do you know of any other matter or thing relating to the execution of the said instrument, and the condition of the mind of H. B. at the time of its execution? Answer fully and particularly.

The following interrogatories have been annexed to commissions to prove wills, issued out of the Surrogate's Court. They are objectionable as leading, and would not probably be allowed in a litigated case.

PROCEEDING FROM THE SECOND INTERROGATORY AS ABOVE.

Third Interrogatory.—Look at the instrument in writing hereunto annexed, bearing date the eighth day of January, in the year 1844, purporting to be the last will and testament of the said James Thompson, and say whether or not you were present as a witness at the time of the execution of the same? Did you see the said James Thompson subscribe his name to the said instrument, or did he make such subscription in your presence?

Fourth Interrogatory.—If, in answer to the last preceding interrogatory, you shall state that you did not see the said James Thompson subscribe his name to the said instrument, or that he did not make such subscription in your presence, did he, at any time, and when, acknowledge to you that he had subscribed the said instrument? State, if you recollect, in what words he expressed to you such acknowledgment?

Fifth Interrogatory.—Did the said James Thompson, at the time of such subscription, or of such acknowledgment aforesaid, declare that the said instrument so subscribed by him, was his last will and testament? Answer fully and particularly. State, to the best of your recollection, the language which he used in making such declaration, or in what manner he declared the said instrument to be his last will and testament, and whether you are certain, and how you become so, that he knew that the said instrument was his will.

Sixth Interrogatory.—Did the said James Thompson, at the time of such subscription, or acknowledgment and declaration aforesaid, request you to become a subscribing witness to the said instrument? Answer fully and particularly. State, to the best of your recollection, the language which he used in making such request, or in what manner he made the same. Did you immediately thereupon sign your name to the said instrument.

Seventh Interrogatory.—Was the person whose name is signed, together with your own, as a subscribing witness to the said instrument, present at the time of such subscription, or acknowledgment and declaration aforesaid? Did you see him sign the said instrument as a witness? Did the said James Thompson request him so to sign the said instrument, and did he so sign the same in his presence? State the name of the said person, whether he is now living, and where he resides.

Eighth Interrogatory.—Was the said James Thompson, at the time he so executed the said instrument, of sound mind and memory, and in all respects competent to devise real estate: and was he, or did he appear to you to be under any restraint, and was he competent to transact ordinary business, and to dispose of his property and estate.

Ninth Interrogatory.—(Same as the eighth of the above series.)

SURROGATE'S ALLOWANCE OF INTERROGATORIES.

Present, &c.

Title. (As in No. 3.)

At, &c. (As in No. 3.)

Ordered that the within interrogatories be, and the same are hereby allowed and settled,

A. W. BRADFORD, *Surrogate.*

No. 14. P. 170.

THE DEPOSITIONS OF WITNESSES ARE TAKEN IN THE FOLLOWING FORM.

Surrogate's Court—County of New York.

IN THE MATTER OF PROVING THE LAST
WILL AND TESTAMENT
OF
JAMES THOMPSON, DECEASED.

County of New York, ss.—Samuel Belknap, of the city of New York, a witness, produced, sworn and examined in this matter, on the part of Philip Thompson, the executor named in the last will and testament of James Thompson, deceased, in support of the said will, being

duly sworn and examined before A. W. Bradford, surrogate of the county of New York, doth depose and say:

Question. Were you acquainted with James Thompson, deceased? and if so, how intimately, and how long?

Answer. I was well acquainted with him for several years previous to his death, &c., &c.

No. 15. Pp. 154, 170.

FORMS OF DEPOSITION OF WITNESSES PROVING WILL.
PROOF OF CUSTODY. (See p. 154.)^(h)

Title. (See No. 2.)

County of New York, ss.—Philip Thompson, of the city of New York, being duly sworn and examined before A. W. Bradford, surrogate of the county of New York, doth depose and say, that he received the instrument in writing, bearing date the eighth day of January, in the year one thousand eight hundred and fifty-five, purporting to be the last will and testament of James Thompson, deceased, from the said James Thompson, immediately after he executed the same, that the said instrument remained in the custody of this deponent until he brought the same to the office of the surrogate of the county of New York, where he deposited the same for probate, and that, whilst the said instrument remained in the custody of this deponent, the same was in no respect altered or changed.

Sworn this seventeenth day of

June, 1855, before me,

ALEXANDER W. BRADFORD, *Surrogate.*

PHILIP THOMPSON.

ANOTHER FORM.

Title. (See No. 2.)

County of New York, ss.—Edgar Slosson and Philip Thompson, both of the city of New York, being severally and duly sworn and examined before A. W. Bradford, surrogate of the county of New York, do depose and say as follows: and the said Edgar Slosson for himself doth depose and say, that at the request of James Thompson, now deceased, he drew and wrote the instrument in writing, now produced and shown to this deponent, bearing date the eighth day of January, in the year one thousand eight hundred and fifty-five, purporting to be the last will and testament of the said James Thompson, deceased, and attend to the execution of the same, that he received the said instrument from the said James Thompson, immediately after the execution thereof, and that the same remained in the custody of this deponent until the twelfth day of April last past, when he handed the same to Philip Thompson, one of the executors therein named, to take charge thereof; and the said Philip Thompson for himself doth depose and say, that he received the said instrument from the said Edgar Slosson on the twelfth day of April last past, as above stated; that the same remained in his custody until the twentieth day of April last past, when he brought the same to the office of the surrogate of the county of New York, where he deposited the same for probate. And the deponents further say, that whilst the said instrument remained in their respective custody, the same was in no respect altered or changed.

Sworn this seventeenth day of

June, 1855, before me,

ALEXANDER W. BRADFORD, *Surrogate.*

EDGAR SLOSSON,

PHILIP THOMPSON.⁽ⁱ⁾

DEPOSITIONS OF SUBSCRIBING WITNESSES.

Surrogate's Court—County of New York.

IN THE MATTER OF PROVING THE LAST
WILL AND TESTAMENT OF
JAMES THOMPSON, DECEASED,
AS A WILL OF REAL AND PERSONAL ESTATE.

Examination of Witnesses, sworn and examined in the above entitled matter.

County of New York, to wit:—Thomas Brown, of the city of New York, being duly sworn as a witness in the above entitled matter, and examined on behalf of the applicant to prove

^(h) See S. L. 1887, 527, sec. 17; 2 E. S. 66, sec. 58.

⁽ⁱ⁾ Proof of custody is taken only in rare cases, at present, in the court of the surrogate of the county of New York.

said will, says: I was well acquainted with James Thompson, now deceased. I knew the above named decedent for about six years before his death. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as his last will and testament, and bearing date the tenth day of December, in the year one thousand eight hundred and fifty-four, was made by the decedent at the residence of the decedent in the city of New York, in the presence of myself, and of James Thorne, the other subscribing witness. At the time of his making such subscription, the said decedent declared the said instrument so subscribed by him to be his last will and testament; and I thereupon signed my name as a witness at the end of said instrument, at the request of said decedent, and in his presence.

The said decedent, at the time of so executing said instrument, was upwards of the age of twenty-one years, and of sound mind, memory and understanding, and not under any restraint, or in any respect incompetent to devise real estate. I also saw said James Thorne, the other attesting witness, sign his name as a witness at the end of said will, and know that he did so at the request of said decedent, and in his presence.

Sworn this fifteenth day of }
June, 1855, before me, }

ALEXANDER W. BRADFORD, *Surrogate*.

THOMAS BROWN.

The other subscribing witnesses each make a similar deposition.

ANOTHER FORM.

Title. (See No. 2.)

County of Kings, City of Brooklyn, ss.—Clinton Marshall, of the city of New York, being duly sworn and examined before Jesse C. Smith, surrogate of the county of Kings doth depose and say, that he was well acquainted with William Jones, now deceased, that he was present as a witness, and did see the said William Jones subscribe his name at the end of the instrument in writing, now produced and shown to this deponent, bearing date the eighth day of January, in the year one thousand eight hundred and fifty-four, purporting to be the last will and testament of the said William Jones, deceased. That the said William Jones, at the time of making the said subscription, declared the said instrument to be his last will and testament, and requested this deponent to sign his name as a witness thereto. Thereupon this deponent accordingly signed his name as a witness at the end of the said instrument. This deponent further says, that the said William Jones, at the time he so executed the said instrument, was a citizen of the United States, of full age, of sound mind and memory, in all respects competent to devise real estate, and not under restraint, and that this deponent saw James Clark, of the city of Albany, sign the said instrument at the end thereof as a witness, in the presence of the said William Jones, and at his request.

Sworn this seventeenth day of }
June, 1854, before me, }

JESSE C. SMITH, *Surrogate*.

CLINTON MARSHALL.

No. 16. P. 154.

IN CASE OF THE DEATH OR NON-RESIDENCE OF EITHER OF THE SUBSCRIBING WITNESSES, THE PROOF OF HIS HANDWRITING IS AS FOLLOWS:—

Title. (See No. 2.)

County of New York, ss.—George Jackson, of the city of New York, being duly sworn and examined before A. W. Bradford, surrogate of the county of New York, doth depose and say, that he is well acquainted with De Witt Sampson, late of the city of New York, but now of the city of Cincinnati, in the state of Ohio, and with his manner and style of handwriting, having often seen him write, and that he verily believes that the signature, "De Witt Sampson," signed as a witness to the instrument in writing, now produced and shown to this deponent, bearing date the eighth day of January, in the year one thousand eight hundred and fifty-four, purporting to be the last will and testament of James Thompson, deceased, is the true and genuine handwriting and signature of the said De Witt Sampson, and that the said De Witt Sampson resides in the city of Cincinnati aforesaid, and is not now within the jurisdiction of the state of New York.

Sworn this seventeenth day of }
June, 1854, before me, }

ALEXANDER W. BRADFORD, *Surrogate*.

GEORGE JACKSON.

No. 17. P. 170.

ORDER ADMITTING WILL TO PROBATE AND RECORD.

*Title. (See No. 3.)**At, &c. (See No. 3.)*

Satisfactory proof having been made of the due service of the citation heretofore issued in this matter, requiring the proper persons to appear in this court on the seventeenth day of June last past, and attend the probate of the last will and testament of James Thompson, late of the city of New York, deceased, bearing date the fourth day of December, in the year one thousand eight hundred and fifty-four; and Philip Thompson, the executor named in the said last will and testament, having appeared by Charles Conner, his proctor and counsel, in support of the proof of the same; and Cornelia Thompson, the widow of the said deceased, having appeared in person and by George Lord, her proctor and counsel, in opposition thereto; and David R. Jaques, the special guardian of Charles Thompson and Henry Thompson, minors, two of the heirs and next of kin of the said deceased, having also appeared, and no other parties or persons having appeared in the said matter, and the said matter having been duly heard and adjourned from day to day until this day; and, after hearing the proofs and allegations of the said Philip Thompson and of the said Cornelia Thompson; and the said David R. Jaques, special guardian as aforesaid, having submitted the rights and interests of the said minors to the care and discretion of this court; and due deliberation being thereon had; and it appearing, upon the proof taken, that the said was duly executed—that the testator, at the time of executing the same, was in all respects competent to devise real estate, and not under restraint; and the surrogate being satisfied of its genuineness and validity; (j) And, on motion of Mr. Charles Conner, in behalf of the said executor, it is adjudged and decreed, and the surrogate of the county of New York, by virtue of the power and authority in him vested, doth adjudge and decree, that the said last will and testament was duly executed—that the same is genuine and valid—that the said last will and testament, and the proofs and examinations taken in respect to the same, be recorded; and that the said last will and testament be admitted to probate, and that the same be, and hereby is, established as a will of real and personal estate. (k)

The following entry, also, is made in the book of surrogate's minutes in the New York surrogate's office. (See p. 33.)

*Title. (See No. 3.)**At, &c., (See No. 3.)*

The proofs in this matter being deemed sufficient, it is ordered that the said will be admitted to probate, and that the usual decretal order be entered.

No. 18. P. 171.

COMPLETE RECORD OF WILL.

Be it remembered, that heretofore, to wit, on the eighteenth day of August, in the year one thousand eight hundred and forty-five, Anthony A. Jacobus, the sole executor named in the last will and testament of Richard Martin, late of the city of New York, deceased, appeared in open court, before the surrogate of the county of New York, and made application to have the said last will and testament, which relates to both real and personal estate, proved; and, on such application, the surrogate did ascertain, by satisfactory evidence, who were the widow, heirs and next of kin of the said testator, and their respective residences; and some of them appearing to be minors, and having no general guardian residing within the state of New York, a special guardian was appointed, in due form of law, to take care of their interests in the matter of proving the said will, by an order entered for that purpose

(j) See B. L. 1837, 527-8, sec. 17; 2 R. S. (4th ed.) 251, sec. 64; *Ante*, p. 152.

(k) The following is the form of the decretal order, on the establishment of a will entered in every case in the court of the surrogate of the county of New York. It is the "usual" decretal order referred to in the entry in the minutes.

*(Title.)**(At, &c.)*

The executors, next of kin and heirs at law of said deceased, having this day appeared to attend the probate of said will, in pursuance of the citation heretofore issued, and the proofs and examinations of the subscribing witnesses to said will having been duly taken and heard; and, upon such proof, it appearing satisfactory to this court that the said will had been duly executed according to law, and that said testator, at the time of executing the same, was in all respects competent to dispose of his estate:

It is therefore ordered, decided and decreed, that the said will be, and the same is hereby established as a valid will, and that the same be admitted to probate and recorded.

by said surrogate; and said surrogate did thereupon issue a citation in due form of law, directed to the said widow, heirs and next of kin, and special guardian, by their respective names, stating their respective places of residence, requiring them to appear before said surrogate, at his office in the city of New York, on the eighteenth day of August, then instant, to attend the probate of the said will. And afterwards, to wit, on the said eighteenth day of August, satisfactory evidence, by affidavit, was produced and presented to said surrogate, of the service of the said citation, in the mode prescribed by law; and, on that day, no one appearing to oppose the probate of such will, such proceedings were thereupon had afterwards, that the surrogate took the proof of said will hereinafter set forth, upon this twentieth day of September, in the year one thousand eight hundred and forty-five; and he adjudged the said will to be a valid will of real and personal estate, and the proofs thereof to be sufficient, which said last will and testament, and proofs, are as follows, that is to say:

WILL (I)

I, *R. M.*, of the city of New York, Gentleman, do hereby make and publish this, **MY LAST WILL AND TESTAMENT.**

I BEQUEATH to my wife, absolutely, the wines, liquors, fuel and other consumable household stores and provisions, and the linen, China and glass, together with the moneys and bank notes of common and usual currency, which may be in my dwelling-house at the time of my decease; and also such part of my plate which is engraven with the initials of her father's name. I ALSO give to my wife the use and enjoyment, during her life, of the household goods and furniture, fixtures and utensils, (not hereinbefore bequeathed,) and the plate, marked with the initials of my name, and the books, paintings and prints of which I shall die possessed: And from and after her decease, I direct that the same articles be disposed of as part of the residue of my personal estate: And I direct my executors to cause an inventory to be taken of the same articles, before the delivery thereof to my said wife; and two copies to be made of such inventory, and to be signed by my said wife and executors, of which copies so signed, one shall be delivered to my said wife, and the other kept by my executors.

I GIVE AND DEVISE unto my son *R.*, ALL THAT my freehold messuage, with the out-buildings, garden, &c., thereto adjoining, situate and being, &c., now in the occupation of, &c., for and during his natural life. And from and immediately after his decease, I devise such hereditaments unto my son *D.*, and his heirs forever.

AND WHEREAS, by virtue of a lease, bearing date on or about the first day of June, 1840, made between *A. B.*, of the first part, and myself, of the second part, I am entitled to the remainder of a term of years, now to come and unexpired, of and in ALL THAT messuage, tenement or dwelling-house, situate and being in . . . street, in the city of New York, now in the occupation of *G. V.*, with the coach-house, stables, &c., thereto adjoining or belonging, &c. Now I GIVE unto my daughter *M.* the said leasehold premises, for and during so many years of the said term as she shall happen to live: And from and after her decease, I BEQUEATH the same leasehold premises to my grandson, *V. M.*, for the whole residue of the said term, which may be to come and unexpired therein at the decease of my said daughter *M.*

I GIVE AND DEVISE unto my son *C.*, for and during his life, provided he shall continue to reside therein, for the term of . . . years next after my decease, ALL THAT messuage, situate in . . . street, in the city of Rochester, in the state of New York, and the stable, garden, &c., thereto belonging, and now occupied with the said messuage by my son *C.*: And from and after the decease of my said son *C.*, or if he shall not continue to reside in the said messuage and premises for the term, and in the manner aforesaid, then I devise such hereditaments, immediately upon the happening of either the said events, to my grandson, *T. L. M.*, and his heirs forever.

I GIVE AND DEVISE unto *F. N.*, of, &c., and his heirs, ALL THAT messuage, &c., with the lands thereto adjoining, and usually occupied therewith, situate, &c., and now in the tenure of *B. R.*, containing, by estimation, . . . acres, (more or less,) &c., UPON TRUST, to let the same from year to year, or for any term not exceeding twenty-one years, for the best rent that can be obtained for the same, but without taking any fine or premium therefor; and on receipt of such rent and profits. UPON TRUST, from time to time to apply such rents and profits unto and to the use of *R. T.* and *J. T.*, two of the children of my daughter *M.*, until the youngest of such children attain the age of twenty-one years. And when and so soon as that event shall happen, I devise the messuage, lands and hereditaments last

(I) This was deemed a proper place to include a form of a will, with the attestation. The form given is taken from Taylor's Precedents of Will, 187.

mentioned unto the said *R. T.* and *J. T.*, and their heirs forever, as tenants in common, and not as joint tenants.

I GIVE AND DEVISE all the rest, residue and remainder of my real estates, and I BEQUEATH the rest of my personal estate unto *B. B.* and *C. D.*, of the city of New York, merchants, their heirs, executors, &c., UPON THE TRUSTS hereinafter particularly mentioned, hereby giving and granting full power and authority to the said *B. B.* and *C. D.*, and the survivor of them, and his heirs, to sell such real estates, together or in parcels, either by public auction or private contract, at such time and place, or times and places, and subject to such stipulations, relating to the title, or to the payment of the purchase money, (part whereof may be allowed to remain on mortgage of the estates sold, for any reasonable time,) or to any other matters connected with the sale, as my said trustees shall judge expedient, or as their counsel shall advise; which sale of such real estates shall be made as soon as conveniently may be after my decease; and also with power for my said trustees to fix a reserved bidding, and buy in any lot or lots at any auction, and to rescind or vary any contract or contracts for sale, without being liable for any consequential loss, and also to execute such instruments and assurances as shall be requisite for completing the sale of my said estates, or any of them. AND I direct that my said trustees shall convert and get in my residuary personal estate, and invest the moneys to arise from such real estates and residuary personal estate in the names or name of the trustees or trustee, for the time being, of my will, in or upon real estate, or any stocks, funds, or other securities in the United States, generally considered good and permanent; with liberty for the said trustees or trustee, with the consent in writing of my said wife, to vary and transmute the investments from time to time for any other investments of the description aforesaid: AND UPON FURTHER TRUST, to pay over to my said wife the annual income of the said moneys, or the stocks, funds and securities whereon the same shall be invested, during her life; and after her death, as to the same moneys, stocks, funds and securities, and the income from thenceforth to become due for the same. UPON TRUST, to pay thereout to my son *R.*, his executors, administrators or assigns, the sum of \$ which sum shall be absolutely vested in him, on my decease, and shall carry interest after the rate of . . . per cent per annum, from the decease of my said wife, until payment thereof; and subject to the payment of the same sum and interest, IN TRUST for my other children, (naming them,) to be divided equally among them, their respective executors, administrators and assigns, and their respective shares to be absolutely vested on my decease; and the share of my said daughter to be received, enjoyed and disposed of by her as her separate estate, without the control or interference of her present or any future husband, and her receipt to be (notwithstanding coverture) an effectual discharge for the same. AND I hereby declare, that my said trustees or trustee shall have a discretionary power to postpone, for any period not considered illegal by the laws of this state, the conversion or getting in of any part of my residuary personal estate, which shall, at my decease, consist of stocks, funds or securities, of any description whatever: And I further declare, that my last devised real estates and hereditaments, from the time of my decease, shall be considered as absolutely converted into personal estate, and subject to the trusts lastly hereinbefore contained.

I DEVISE all my real estate, vested in me as trustee or mortgagee, to the said *B. B.* and *C. D.*, subject to the equities affecting the same respectively.

I EMPOWER the trustees or trustee for the time being of this my will, to give receipts for all moneys and effects to be paid or delivered to such trustees or trustee, by virtue of my will, and declare that such receipts shall exonerate the persons taking the same from all liability to see to the application or disposition of the money or effects therein mentioned. I ALSO EMPOWER the trustees or trustee for the time being of my will, to compound or allow time for the payment of any debt or debts due or to become due to my estate, to pay all debts due from me according to their legal priority, and to settle all demands against my estate, and all and all manner of accounts between me and any person or persons, on such terms as my said trustees or trustee shall in their or his discretion think expedient, and to refer any matters in difference relating to my affairs to arbitration. AND I hereby declare, that if my said trustees, or any of them, or any person or persons to be appointed under this clause, shall die, or be unwilling or incompetent to execute the trusts of my will, it shall be lawful for my wife, during her life, and after her death, for the competent trustees or trustee for the time being, (if any,) whether retiring from the office of trustee or not, or (if none) for the executors or administrators of the last surviving trustee, to substitute, by any writing under their or his hands or hand, any fit person or persons to be trustees or trustee, in whom alone, or (as the case may be) jointly with the surviving or continuing trustees or trustee, my trust estate shall be vested. AND I exempt every trustee of my will from liability for losses occurring without his own wilful default, and authorize him to retain and allow to his co-trustees or co-trustee all expenses incidental to the trusteeship.

I appoint the said *B. B.* and *C. D.*, executors of this my last will and testament.

I hereby revoke and annul any will or wills heretofore executed by me.

FORMS ON PROVING WILLS.

XV

In witness whereof I have hereunto set my hand this day of in the year one thousand eight hundred and fifty

R. M.(m)

WITNESSES.

O. P., residing at No. Broadway, in the city of New York.
S. T., residing at No. Bowery, in the city of New York.(n)

Subscribed by R. M., the testator named in the foregoing will, in our presence, and at the time of making such subscription declared by the testator to be his last will and testament, and each of us signs his name as a witness at the end of the will, at the request of the testator, and in his presence.(o)

O. P., residing, &c.
S. T., residing, &c.

Then follow the

DEPOSITIONS AND TESTIMONY OF THE WITNESSES.

(CERTIFICATE AT THE END OF THE RECORD.)

County of New York, ss.—Recorded the preceding last will and testament of R. M., deceased, as a will of real and personal estate, together with the proofs taken in the court of the surrogate of the county of New York relating to the said last will and testament; which record is hereby signed and certified by me, pursuant to the provisions of the Revised Statutes, this twentieth day of September, one thousand eight hundred and fifty-four.(p)

ALEXANDER W. BRADFORD.

No. 19. P. 171.

CERTIFICATE ON WILL.

County of New York, ss.—Be it remembered, that on the day of the date hereof, the last will and testament of James Thompson, late of the city of New York, deceased, (being the foregoing written instrument,) was duly proved before A. W. Bradford, surrogate of the said county, according to law, as and for the last will and testament of the real and personal estate of said deceased; which said last will and testament, and the proofs and examinations taken thereon, are recorded in this office.

In testimony whereof, the surrogate of the said county hath hereunto set his [SEAL] hand and affixed his seal of office, this eleventh day of August, in the year of our Lord one thousand eight hundred and fifty-five.

ALEXANDER W. BRADFORD, *Surrogate.*

No. 20. Pp. 172, 194.

FORM OF PROBATE.

A correct copy of the Will, with the following Certificate:

County of New York, }
[Surrogate's Office. }

Be it remembered, that on the day of the date hereof, the last will and testament of James Thompson, late of the city of New York, deceased, bearing date the seventh day of November, one thousand eight hundred and thirty-seven, (the foregoing being a true copy thereof,) was duly proved before A. W. Bradford, surrogate of the said county, according to law, as

(m) By the Revised Statutes it is not necessary to seal a will.

(n) This form of attestation follows strictly the words of the statute, which prescribes that each of the witnesses "shall sign his name as a witness *at the end of the will.*"

(o) This attestation certificate is a summary of the ceremonies usually observed on the execution of a will.

(p) The following is suggested as a form of this certificate more strictly in accordance with the provisions of the 14th section of the Revised Statutes. (2 R. S. 58.)

County of New York, ss.—It appearing upon the proofs duly taken in respect to the last will and testament of James Thompson, late of the city of New York, deceased, that the said will was duly executed, and that the said James Thompson, at the time he executed the same, was in all respects competent to devise real estate, and not under restraint, the said last will and testament, and the said proofs and examinations are hereby recorded, signed and certified by me, pursuant to the provisions of the Revised Statutes, this seventeenth day of July, in the year of our Lord one thousand eight hundred and fifty-five.

A. W. B. *Surrogate.*

and for the last will and testament of the real and personal estate of said deceased; which said last will and testament, and the proofs and examinations taken thereon, are recorded in this office.

In testimony whereof, the surrogate of the said county hath hereunto set his hand and affixed his seal of office, this eleventh day of August, in the year of our Lord one thousand eight hundred and fifty-five.

ALEXANDER W. BRADFORD, *Surrogate*.

County of New York, } ss.
Surrogate's Office,

Be it remembered, that on the day of the date hereof, Philip Thompson, the sole executor named in the last will and testament of James Thompson, late of the city of New York, deceased, having first taken and subscribed an oath faithfully and honestly to discharge the duties of such executor, letters testamentary were granted to him accordingly.

In testimony whereof, the surrogate of said county hath hereunto set his hand [SEAL] and affixed his seal of office, the eleventh day of August, one thousand eight hundred and fifty-five.(g)

A. W. BRADFORD, *Surrogate*.

No. 21. P. 170.

ORDER SETTING ASIDE A WILL.

Title. (See No. 3.)

At, &c. (See No. 3.)

Satisfactory proof having been made of the due service of the citation heretofore issued in this matter, requiring the proper persons to appear in this court, on the seventeenth day of June last past, and attend the probate of the last will and testament of James Thompson, late of the city of New York, deceased, and Philip Thompson, the executor named in the said last will and testament, having appeared by Charles Conner, his proctor and counsel, in support of the proof of the same, and Cornelia Thompson, the widow of the said deceased, having appeared in person and by George Lord, her proctor and counsel, in opposition thereto, and David R. Jaques, the special guardian of Charles Thompson and Henry Thompson, minors, two of the heirs and next of kin of the said deceased, having also appeared, and no other parties or persons having appeared in the said matter, and the said matter having been duly heard, and adjourned from day to day until this day, and the instrument in writing, bearing date the eighth day of January, in the year one thousand eight hundred and fifty-four, purporting to be the last will and testament of the said James Thompson, deceased, having been produced, and Clinton Marshall and James Clark, two of the subscribing witnesses to the said instrument, having been duly examined touching the facts and circumstances attending the execution thereof, and the competency of the said James Thompson to execute the same as and for his last will and testament, and after hearing the proofs and allegations of the said Philip Thompson, and of the said Cornelia Thompson, and the said David R. Jaques, special guardian as aforesaid, having submitted the rights and interests of the said minors to the care and discretion of this court, and due deliberation being thereon had, and on motion of Mr. George Lord, of counsel for the said Cornelia Thompson, it is adjudged and decreed, and the surrogate of the county of New York, by virtue of the power and authority in him vested, doth adjudge and decree, that the said instrument in writing

(g) These two certificates may properly, it is suggested, be embodied in one, in the following form:—

State of New York, } ss.
County of New York.

I, A. W. B., surrogate of the county of New York, do hereby make known and certify to all whom it may concern, that the foregoing is a true copy of the last will and testament of James Thompson, late of the city of New York, deceased, and of the whole thereof, and that the said last will and testament was, on this seventeenth day of June, in the year one thousand eight hundred and fifty-four, duly proved before me according to law, and by me admitted to probate, and recorded in the office of the surrogate of the county of New York; and further, that the administration of all and singular the goods, chattels and credits of the said James Thompson, deceased, and the execution of the said last will and testament, were, on the same day, duly granted and committed by me to Philip Thompson, one of the executors named in the said will, he having first duly taken and subscribed an oath that he would faithfully and honestly discharge the duties of executor thereof, which oath is filed in the office of the surrogate aforesaid.

In testimony whereof, I, the said surrogate, have hereunto set my hand and affixed my seal of office, at the surrogate's office in the city of New York, this seventeenth day of June, in the year one thousand eight hundred and fifty-five.

A. W. B., *Surrogate*.

was not executed and attested in the manner prescribed by law for the execution and attestation of last wills and testaments; and further it is declared, and the surrogate aforesaid, by virtue of the power and authority aforesaid doth declare, that the said instrument in writing is utterly null and void, as or for the last will and testament of the said James Thompson, deceased; and further the said surrogate doth order, that the costs of all the parties to this proceeding, and the fees and expenses thereof, be paid out of the estate of the said deceased.

No. 22. P. 182.

RECORD OF FOREIGN WILL ON AN EXEMPLIFICATION.

The Exemplification is entered in full upon the Record, and the following Certificate is appended:

County of New York, ss.—I, David B. Ogden, surrogate of the said county, do hereby certify to all whom it may concern, that the last will and testament, with three codicils of Abraham Beach, late of the county of Somerset, in New Jersey, deceased, has been duly admitted to probate by me, upon the production of a duly authenticated copy thereof, from under the seal of the court in which the same was proved; and I further certify that the foregoing is a correct record of such authenticated copy.

In testimony whereof, I have hereunto set my hand, this seventeenth day of [SEAL] November, in the year of our Lord one thousand eight hundred and forty-three.

DAVID B. OGDEN.

No. 23. P. 197.

CONSENT OF HUSBAND THAT LETTERS TESTAMENTARY ISSUE TO HIS WIFE.

I, Alexander Wilson, of the city of Albany, merchant, the husband of Jane Wilson, the executrix named in the last will and testament of James Thompson, late of the city of New York, deceased, do hereby consent that letters testamentary of the said last will and testament issue to the said Jane Wilson, and that she take upon herself the burden of the execution thereof.

Dated this eighteenth day of June, A. D. 1855.

ALEXANDER WILSON.

No. 24. P. 46.

AFFIDAVIT OF INTENTION TO FILE OBJECTIONS AGAINST THE GRANTING LETTERS TESTAMENTARY.

Surrogate's Court—County of New York.

<p>IN THE MATTER OF THE GOODS, CHATTELS AND CREDITS OF JAMES THOMPSON, DECEASED.</p>	}
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City and County of New York, ss.—Cornelia Thompson, of the city of New York, being duly sworn, doth depose and say, that she is the widow of James Thompson, late of the city of New York, deceased, whose last will and testament has lately been admitted to probate by the surrogate of the county of New York, and of which said will Philip Thompson is named one of the executors. That she is a legatee under the said last will and testament, and intends to file objections against the granting of letters testamentary thereof to the said Philip Thompson, and that she is advised and believes that there are just and substantial objections to the granting of such letters to the said Philip Thompson.

Sworn this tenth day of June, }
1855, before me, }

CORNELIA THOMPSON.

JOHN WELLS, *Commissioner of Deeds.*

OBJECTIONS AGAINST THE GRANTING OF LETTERS TESTAMENTARY.

Title. (As above.)

To Alexander W. Bradford, Surrogate of the County of New York :

The objections of Cornelia Thompson, of the city of New York, widow, a legatee under the last will and testament of James Thompson, late of the city of New York, deceased, against the granting of letters testamentary of the said last will and testament to Philip Thompson, one of the executors therein named.

First Objection.—That the said Philip Thompson is incompetent to execute the duties of his trust as executor of the said last will and testament, by reason of improvidence.

Second Objection.—That the circumstances of the said Philip Thompson are such as not to afford adequate security to the creditors, legatees and relatives of the said deceased for the due administration of the estate; that he has recently failed in his business as a merchant in the city of New York, and become insolvent; and that the debts owing by the said Philip Thompson greatly exceed the amount of property belonging to him.

Dated this sixth day of July, A. D. 1855.

CORNELIA THOMPSON.

GEORGE LORD, *Of Counsel for Objector.*

ORDER THAT EXECUTOR APPEAR TO ATTEND INQUIRY.

Title. (As above.)

At, &c. (See No. 3.)

On reading and filing the objections of Cornelia Thompson, the widow of James Thompson, late of the city of New York, deceased, and a legatee under his last will and testament, against the granting of letters testamentary of the said last will and testament to Philip Thompson, one of the executors therein named: It is ordered that the said Philip Thompson appear before the surrogate of the county of New York, at his office in the city of New York, on the tenth day of July, instant, at ten o'clock in the forenoon of that day, and attend the inquiry into the said objections.

ALEXANDER W. BRADFORD, *Surrogate.*

GEORGE LORD, *Proctor for Objector.*

ORDER THAT OBJECTOR PROCEED WITH INQUIRY.

Title. (As above.)

At, &c. (See No. 3.)

Cornelia Thompson, the widow of James Thompson, late of the city of New York, deceased, and a legatee under his last will and testament, having filed objections against the granting of letters testamentary of the said last will and testament to Philip Thompson, one of the executors therein named; On motion of Mr. Charles Conner, of counsel for the said Philip Thompson, it is ordered, that the said Cornelia Thompson appear before the surrogate of the county of New York, at his office in the city of New York, on the tenth day of July, instant, at ten o'clock in the forenoon of that day, and proceed with the inquiry into the said objections.

ALEXANDER W. BRADFORD, *Surrogate.*

CHARLES CONNER, *Proctor for Executor.*

DECREE ON OBJECTIONS.

Title. (As above.)

At, &c. (See No. 3.)

Cornelia Thompson, the widow of James Thompson, late of the city of New York, deceased, and a legatee under his last will and testament, having duly filed her objections against the granting of letters testamentary of the said last will and testament to Philip Thompson, one of the executors named therein, and the surrogate having inquired into the said objections, and due proof having been taken, and, after hearing counsel for the respective parties, it is adjudged and decreed, and the surrogate, by virtue of the authority in him vested, doth adjudge and decree, that [*] the said Philip Thompson is incompetent, by reason of improvidence, to execute the duties of his trust as such executor, and that letters testamentary of the said last will and testament be refused to the said Philip Thompson.

Or proceeding from the [*] the circumstances of the said Philip Thompson are such as not to afford adequate security to the creditors, legatees and relatives of the said de-

ceased, for the due administration of the said estate. And further, the said surrogate doth order, that such letters testamentary aforesaid be refused to the said Philip Thompson, until he shall give the like bond as is required by law of administrators in cases of intestacy.

DECREE DISMISSING OBJECTIONS.

Proceeding from the [*] the said objections be dismissed. And further, it is ordered that such letters testamentary aforesaid issue to the said Philip Thompson, and that the said Cornelia Thompson pay the costs of the said Philip Thompson on this proceeding, and the fees and expenses thereof, to be taxed.(r)

No. 25. P. 203.

FORM OF RENUNCIATION.

Surrogate's Court—County of New York.

IN THE MATTER OF THE GOODS, &c., OF JAMES THOMPSON, DECEASED.	}
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I, Charles Jones, of the city of New York, gentleman, one of the executors named and appointed in and by the last will and testament of James Thompson, late of the city of New York, deceased, do hereby renounce the said appointment, and all right and claim to letters testamentary of the said last will and testament, or to act as executor thereof, and pray the surrogate of the county of New York to accept and record this, my renunciation.

Dated this eighth day of June, A. D. 1855.

CHARLES JONES.

Signed in the presence of

JOHN STRONG,
HENRY SMITH.

The proof of the execution of the renunciation may be by affidavit, or by acknowledgment, before a commissioner or other proper officer.

No. 26. P. 202.

PROCEEDINGS TO OBTAIN A DECREE THAT A PERSON NAMED AS EXECUTOR HAS RENOUNCED.

County of New York, }
Surrogate's Court. }

To A. W. BRADFORD, Surrogate of the County of New York:

The application of Harris Gibbons, of the city of New York, merchant, respectfully sheweth, that he is a creditor of James Thompson, late of the city of New York, deceased. That the last will and testament of the said James Thompson, deceased, was proved before the surrogate of the county of New York, on the seventeenth day of June last past, and that Philip Thompson, a person named and appointed as one of the executors thereof, has not yet appeared to qualify and take upon himself the execution of the said last will and testament. That the said Philip Thompson resides in the city of New York.

The said applicant therefore applies for a summons, to be issued out of and under the seal of this court, pursuant to the statute in such case made and provided, to be directed to the said Philip Thompson, requiring him to appear in this court and qualify as one of the executors of the said last will and testament, within a certain time therein to be limited; or that, in default thereof, he will be deemed to have renounced the said appointment.

Dated this first day of July, A. D. 1855.

HARRIS GIBBONS.

JAMES MITCHELL, *Proctor for Applicant.*

City and County of New York, ss.—On this first day of July, in the year 1855, personally appeared before me, Harris Gibbons, named in the foregoing application, and made oath

(r) The payment of these costs may be enforced by attachment.

that he had read the said application, and knew the contents thereof, and that the matters of fact therein stated were true.

AARON JONES, *Commissioner of Deeds.*

ORDER FOR ISSUING SUMMONS.

At, &c. (See No. 3.)

IN THE MATTER OF THE GOODS, CHATTELS,
AND CREDITS
OF
JAMES THOMPSON, DECEASED.

On reading and filing the application of Harris Gibbons, a creditor of James Thompson, late of the city of New York, deceased, it is ordered that a summons issue to Philip Thompson, a person named and appointed as one of the executors of the last will and testament of the said James Thompson, deceased, requiring him personally to appear in this court, before or on the eighth day of August next, at ten o'clock in the forenoon of that day, and qualify as one of the executors of the last will and testament aforesaid; or that, in default thereof, he will be deemed to have renounced the said appointment.

SUMMONS ON THE ABOVE ORDER.

The people of the state of New York, to Philip Thompson, named and appointed one of the executors of the last will and testament of James Thompson, late of the city of New York, deceased.

You are hereby summoned and required to appear before the surrogate of the county of New York, at his office in the city of New York, before or on the eighth day of August next, at ten o'clock in the forenoon of that day, and qualify as one of the executors of the last will and testament aforesaid, or, in default thereof, you will be deemed to have renounced the said appointment.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, Alexander W. Bradford, surrogate of our said county of New York, at the city of New York, the twentieth day of July, in the year one thousand eight hundred and fifty-five, and of our independence the eightieth.

A. W. BRADFORD.

DECREE THAT EXECUTOR HAS RENOUNCED.

Title. (See No. 26.)

At, &c. (See No. 3.)

Whereas Harris Gibbons, of the city of New York, merchant, a creditor of James Thompson, late of the city of New York, deceased, lately made application to the surrogate of the county of New York, for a summons to be issued pursuant to the statute in such case made and provided to Philip Thompson, a person named and appointed as one of the executors of the last will and testament of the said James Thompson, deceased, requiring him to appear in this court and qualify as one of the executors of the said last will and testament, or that in default thereof, he would be deemed to have renounced the said appointment; and whereas a summons was thereupon duly issued, directed to the said Philip Thompson, and personally served upon him, as appears by the affidavit of such service duly filed herein, and which said summons and proof of such service thereof are as follows:—[*insert summons and affidavit of service.*] And whereas the said Philip Thompson has neglected to appear and qualify as required by the said summons, it is declared and decreed, pursuant to the statute in such case made and provided, and the surrogate of the county of New York, by virtue of the power and authority in him vested, doth declare and decree, that the said Philip Thompson has renounced his appointment as executor of the last will and testament of the said James Thompson deceased, and it is ordered that the fees of this proceeding be paid out of the estate of the said James Thompson, deceased.

No. 27. P. 200.

EXECUTOR'S OATH.

City and County of New York, ss.—I, Philip Thompson, one of the executors named in the last will and testament of James Thompson, late of the city of New York, deceased, being

duly sworn, do swear and declare, that I reside in the city of New York, and that I will faithfully and honestly discharge the duties of executor of the said last will and testament.

PHILIP THOMPSON.

Sworn this twenty-fifth day of July, }
A. D. 1855, before me, }

ALEXANDER W. BRADFORD, *Surrogate*.

No. 28. P. 201.

LETTERS TESTAMENTARY.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come, or may concern, send greeting;

Know ye, that at the county of New York, on the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and fifty-five, before Alexander W. Bradford, surrogate of our said county, the last will and testament of James Thompson, deceased,^(s) was proved, and is now approved and allowed by us; and the said James Thompson having been, at or immediately previous to his death, an inhabitant of the county of New York, by reason whereof the proving and registering of said will, and the granting administration of all and singular the goods, chattels and credits of the said testator, and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased, and any way concerning his will, is granted unto Philip Thompson, one of the executors in the said will named, he being first duly sworn faithfully and honestly to discharge the duties of such executor according to law.

[I. S.] In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto annexed. Witness, Alexander W. Bradford, Esquire, surrogate of our said county, at the city of New York, the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and fifty-five, and of our independence the eightieth.

A. W. BRADFORD.

*County of New York, }
Surrogate's Office. }*

Recorded the preceding letters in liber No. 6 of Letters Testamentary, page 225, the twenty fifth day of August, one thousand eight hundred and fifty-five.

ALEXANDER W. BRADFORD.

No. 29. P. 224.

PETITION FOR LETTERS OF ADMINISTRATION.

County of New York.—Surrogate's Court.

IN THE MATTER OF THE ADMINISTRATION
OF THE GOODS, CHATTELS AND CREDITS
OF
JOHN KELLY, DECEASED.

TO ALEXANDER W. BRADFORD, Surrogate of the County of New York:

The petition of Eliza Kelly, of the city of New York, respectfully sheweth, that she is the widow of John Kelly, late of the city of New York, gentleman, deceased. That the said John Kelly died a natural death, and died intestate, as your petitioner verily believes. That your petitioner has made diligent search and inquiry for a will of the said deceased, and has not found any, or obtained any information that he left or ever made one. That your petitioner has, to the best of her ability, estimated and ascertained the value of the personal property of which the said deceased died possessed, and that the same does not exceed in value the sum of about five thousand dollars.

That the said intestate left kindred entitled to his estate, whose names and places of residence are as follows: Henry Kelly and William Kelly, residing in the city of New York,

^(s) Immediately after this word *deceased* was inserted in the old forms, the words, "(a copy whereof is hereunto annexed,)" and the letters were attached to a copy of the will, and, together with the will, formed the probate.

and Sarah Blake, wife of William Blake, residing in the city of Troy, in the county of Rensselaer, his only surviving children, and George Kelly, residing in the city of New York, a minor, having no general guardian, the only child of Samuel Kelly, deceased, who was a son of the said intestate.

Your petitioner further sheweth, that the said intestate, at or immediately previous to his death, was an inhabitant of the county of New York; that your petitioner is of full age, and that she is informed and believes that the surrogate of the county of New York has sole and exclusive power to grant letters of administration of the goods, chattels and credits of the said intestate. She prays that such letters may be granted to her in pursuance of the statute in such case made and provided. And your petitioner will ever pray, &c.

ELIZA KELLY.

Dated this fifth day of February, 1855.(f)

State of New York, }
County of New York. } ss.

On the fifth day of February, in the year one thousand eight hundred and fifty-five, personally appeared before me, Eliza Kelly, the petitioner named in the foregoing petition, who being by me duly sworn, did depose and say, that she had read the foregoing petition by her subscribed, and knew the contents thereof, and that the same was true of her own knowledge, excepting as to the matters therein stated on her information and belief, and as to those matters she believed it to be true.

ALEXANDER W. BRADFORD.

If the petitioner desire to have another person joined in the administration, the last clause of the petition will be as follows:

She prays that such letters may be granted to her, and to Jacob Waring, residing in the city of New York, merchant, to be joined with her in the administration, pursuant to the statute in such case made and provided; and she hereby consents to have the said Jacob Waring so joined in such administration.

(f) The following is a form of this application at present in use in the court of the surrogate of the county of New York:

County of New York.—Surrogate's Court.

IN THE MATTER OF THE APPLICATION FOR
LETTERS OF ADMINISTRATION ON THE
ESTATE OF D. T., DECEASED. }

County of New York, to wit:—I, A. T., of the city of New York, merchant, being duly sworn and examined, do depose and say, that I am the son of the said deceased; that said deceased departed this life at the city of New York, on the twenty-first day of September last past, without leaving any last will and testament to my knowledge, information or belief; that said deceased died a natural death, and died possessed of certain personal property in the state of New York, the value whereof does not exceed the sum of about ten thousand dollars, as I have been informed and believe; that said deceased has left him surviving this deponent, his only surviving child, and W. S. and J. S., both residing in the city of New York, and both minors, the only children of M. S., deceased, who was a daughter of the said D. T., deceased, his only next of kin; that the said deceased did not leave a widow him surviving; that this deponent is of full age; that said deceased was, in his life-time, a physician, and was, at or immediately previous to his death, an inhabitant of the county of New York.

And I pray that letters of administration be granted on the estate of said deceased, by the surrogate of the county of New York, to me.

Sworn before me, this first
day of June, 1855. }

A. T.

ALEXANDER W. BRADFORD, Surrogate.

County of New York, ss.—I, A. T., of the city of New York, merchant, do solemnly swear and declare, that I will well, honestly and faithfully discharge the duties of administrator of the estate of D. T., late of the city of New York, deceased, according to law.

Sworn before me, this first
day of June, 1855. }

A. T.

ALEXANDER W. BRADFORD, Surrogate.

At a Surrogate's Court, held in and for the county of New York, at the surrogate's office, in the city of New York, on the first day of October, in the year 1855.

Present—ALEXANDER W. BRADFORD, Surrogate.

In the Matter of the application for Letters of Administration on the Estate of D. T., deceased. }

It is ordered that letters of administration in this matter be granted to A. T., of the city of New York, merchant, the son of the said deceased.

PETITION WHERE THE PARTY APPLYING IS REMOTELY ENTITLED.

Title. (See above.)

To Alexander W. Bradford, Surrogate of the county of New York.

The petition of Mary Nelson, of the city of New York, widow, respectfully sheweth, that she is the sister of Thomas Brown, late of the city of New York, deceased. That the said Thomas Brown died a natural death, and died intestate, as your petitioner verily believes. That your petitioner has made a diligent search and inquiry for a will of the said deceased, and has not found any, or obtained any information that he left or ever made one. That your petitioner has, to the best of her ability, estimated and ascertained the value of the personal property of which the said deceased died possessed, and that the same does not exceed in value the sum of about six thousand dollars.

That the said intestate left kindred entitled to his estate, whose names and places of residence are as follows: Benjamin Brown, residing in the village of Poughkeepsie, in the county of Dutchess, and Reuben Brown, residing in the city of Buffalo, in the county of Erie, both of full age, his brothers.

That your petitioner is the sister of the said intestate, as above stated, and is of full age.

That the said intestate left him surviving no widow, descendant or father.

Your petitioner further shows, that the said intestate, at or immediately previous to his death, was an inhabitant of the county of New York. That your petitioner is informed and believes that the surrogate of the county of New York has sole and exclusive power to grant letters of administration of the goods, chattels and credits of the said intestate. She prays that such letters may be granted to her; and to that end, that a citation may issue out of and under the seal of this court, to be directed to the above named kindred of the said intestate, requiring them to show cause, at a day to be therein specified, why administration of the goods, chattels and credits of the said intestate should not be granted to your petitioner. And your petitioner will ever pray, &c.

Dated the 5th day of February, 1855.

MARY NELSON.

Jurat, same as above.

No. 30. P. 224.

ORDER FOR ISSUING CITATION ON THE ABOVE PETITION.

*Title. (See No. 29.)**At, &c. (See No. 3.)*

On reading and filing the petition of Mary Nelson, of the city of New York, widow, the sister of Thomas Brown, late of the city of New York, deceased, intestate, it is ordered that a citation issue to Benjamin Brown and Reuben Brown, the brothers of the said intestate, requiring them and each of them personally to be and appear in this court on the twenty-fourth day of March next, at ten o'clock in the forenoon, to show cause why administration of all and singular the goods, chattels and credits of the said intestate should not be granted to the said petitioner.

CITATION ON THE ABOVE ORDER.

The People of the State of New York, by the grace of God free and independent: To Benjamin Brown and Reuben Brown, the brothers of Thomas Brown, late of the city of New York, deceased, intestate, send greeting:

You and each of you are hereby cited and required, personally to be and appear before our surrogate of the county of New York, at his office in the city of New York, on the twenty-fourth day of March next, at ten o'clock in the forenoon of that day, then and there to show cause why administration of the goods, chattels and credits of the said intestate should not be granted to Mary Nelson, of the city of New York, widow, his sister.

In testimony whereof, we have caused the seal of office of said surrogate to be hereunto affixed. Witness, Alexander W. Bradford, Esquire, surrogate of our said county, at the city of New York, the sixth day of February, in the year of our Lord one thousand eight hundred and fifty-five, and of our independence the seventy-ninth.

[L. s.]

A. W. BRADFORD.

No. 31. P. 224.

CONSENT TO HAVE ANOTHER PERSON JOINED IN THE ADMINISTRATION.

Title. (See No. 29.)

I, Eliza Kelly, of the city of New York, the widow of John Kelly, late of the city of New York, gentleman, deceased, intestate, and entitled to the administration of the goods, chattels and credits of the said intestate, do hereby consent that such administration be granted to Jacob Waring, of the city of New York, merchant, to be joined with me therein. Dated, &c.

No. 32. P. 224.

FORM OF RENUNCIATION.

Title. (See No. 29.)

I, Benjamin Brown, of the city of Poughkeepsie, in the county of Dutchess, a brother of Thomas Brown, late of the city of New York, deceased, intestate, do hereby renounce all right and claim to administration of the goods, chattels and credits of the said intestate.

Witness, my hand at Poughkeepsie, aforesaid, this eighth day of February, 1855.

BENJAMIN BROWN.

Signed in the presence of

RICHARD REN.

This renunciation must be duly proved or acknowledged.

No. 33. Pp. 198, 200, 226.

FORM OF ADMINISTRATOR'S BOND.

Know all men by these presents, that we, Eliza Kelly, of the city of New York, widow, and John Green, of the same city, carpenter, and George Green, of the same city, merchant, are held and firmly bound unto the people of the state of New York, in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said people; to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated, this seventh day of February, in the year one thousand eight hundred and fifty-five.

The condition of this obligation is such, that if the above bounden Eliza Kelly shall faithfully execute the trust reposed in her as administratrix of all and singular the goods, chattels and credits of John Kelly, late of the city of New York, gentleman, deceased, intestate, and also obey all orders of the surrogate of the county of New York, touching the administration of the estate committed to her, then this obligation to be void, else to remain in full force and virtue.

ELIZA KELLY.	[SEAL]
JOHN GREEN.	[SEAL]
GEORGE GREEN.	[SEAL]

Sealed and delivered in the presence of

JAMES BLACK.

State of New York,
City and County of New York, } ss.

On this seventh day of February, in the year one thousand eight hundred and fifty-five, personally appeared before me Eliza Kelly, John Green and George Green, severally known to me to be the persons described in and who executed the foregoing bond, and respectively acknowledged that they executed the same.

WILLIAM RIPLEY, *Commissioner of Deeds.*

AFFIDAVIT OF JUSTIFICATION.

City and County of New York, ss.—George Green, within named, being duly sworn, doth

GRANTING ADMINISTRATION.

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depose and say, that he is a freeholder, residing in the city of New York, and is worth the sum of ten thousand dollars over and above all his just debts, liabilities and responsibilities.

GEORGE GREEN.

Sworn this seventh day of February, }
 A. D. 1855, before me, }
 A. W. BRADFORD, *Surrogate*.
 A similar affidavit for the other surety.

No. 34. P. 227.

FORM OF ADMINISTRATOR'S OATH.

County of New York, ss.—I, Eliza Kelly, of the city of New York, the widow of John Kelly, late of the said city, gentleman, deceased, intestate, about to be appointed, by the surrogate of the county of New York, administratrix of the goods, chattels and credits of the said John Kelly, deceased, do solemnly swear and declare that I will well, honestly, and faithfully discharge the duties of such administratrix according to law.

ELIZA KELLY.

Sworn this seventh day of February, }
 A. D. 1855, before me, }
 A. W. BRADFORD, *Surrogate*.

No. 35. P. 227.

ORDER FOR ISSUING LETTERS.

*Title. (See No. 29.)**At, &c. (See No. 3.)*

On reading and filing the petition of Eliza Kelly, the widow of John Kelly, late of the city of New York, deceased, praying that letters of administration of the goods, chattels and credits of the said deceased be granted to her; and on reading and filing the bond executed by the said petitioner with two competent sureties, pursuant to the statute; and this court being satisfied that said petitioner is in all respects competent to act as administratrix of the goods, chattels and credits of the said deceased: it is ordered, that the prayer of the said petition be granted, and that letters of administration issue to the petitioner in pursuance thereof.

No. 36. P. 227.

LETTERS OF ADMINISTRATION.

The people of the state of New York, to Eliza Kelly, of the city of New York, the widow of John Kelly, late of the said city, gentleman, deceased, intestate, send greeting: Whereas John Kelly late departed this life intestate, being at or immediately previous to his death an inhabitant of the county of New York, by means whereof the ordering and granting administration of all and singular the goods, chattels and credits, whereof the said intestate died possessed, in the state of New York, and also the auditing, allowing and final discharging the account thereof, doth appertain unto us: And we being desirous that the goods, chattels and credits of the said intestate may be well and faithfully administered, applied and disposed of, do grant unto you, the said Eliza Kelly, full power, by these presents, to administer and faithfully dispose of all and singular the said goods, chattels and credits; to ask, demand, recover and receive the debts which unto the said intestate, whilst living, and at the time of his death, did belong, and to pay the debts which the said intestate did owe, as far as such goods, chattels and credits will thereunto extend and the law require; hereby requiring you to make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said intestate, within a reasonable time, and return a duplicate thereof to our surrogate of the county of New York, within three months from the date of these presents: And if further personal property, or assets of any kind, not mentioned in any inventory that shall have been so made, shall come to your possession or knowledge, to make, or cause to be made, in like manner, a true and perfect inventory thereof, and return the same within two months after discovery thereof; and also to render a just and true account of administration when thereunto required; and we do by these

presents depute, constitute and appoint you, the said Eliza Kelly, administratrix of all and singular the goods, chattels and credits of the said John Kelly, deceased.

In testimony whereof, we have caused the seal of office of the surrogate of said county to be hereunto affixed. Witness, Alexander W. Bradford, surrogate of said county, [L. s.] at the city of New York, the seventh day of February, in the year one thousand eight hundred and fifty-five, and of our independence the seventy-ninth.

A. W. BRADFORD, *Surrogate*.

No. 37. P. 229.

PETITION FOR ADMINISTRATION WITH THE WILL ANNEXED.

County of New York.—Surrogate's Court.

IN THE MATTER OF THE ADMINISTRATION,
WITH THE WILL ANNEXED, OF
THE GOODS, CHATTELS AND CREDITS OF
JAMES THOMPSON, DECEASED.

To ALEXANDER W. BRADFORD, Surrogate of the County of New York:

The petition of Cornelia Thompson, of the city of New York, widow, respectfully sheweth, that James Thompson, late of the city of New York, merchant, deceased, departed this life in the said city, on the tenth day of April, in the year 1854, leaving his last will and testament, in and by which he appointed Philip Thompson the sole executor thereof. That the said last will and testament was duly proved before the surrogate of the county of New York on the fifth day of August, in the said year 1854, and recorded by him in his office; and probate thereof was on the same day granted, and letters testamentary issued to the said Philip Thompson, as such executor aforesaid. And your petitioner prays leave to refer to the said will and probate and letters testamentary, or to the record thereof, if it shall be necessary for her so to do in this matter. That the said Philip Thompson departed this life on the first day of February instant, leaving certain property and assets of the said deceased still unadministered. That your petitioner has, to the best of her ability, estimated and ascertained the amount of such property, and that the same does not exceed in value the sum of five thousand dollars.

Your petitioner further shows that the said deceased, at or immediately previous to his death, was an inhabitant of the county of New York. That your petitioner is the sole residuary legatee under the said last will and testament. That she is the widow of the said deceased, and is of full age. That she is informed and believes that the surrogate of the county of New York has sole and exclusive power to grant letters of administration, with the will annexed, of the goods, chattels and credits of the said deceased left unadministered by the said Philip Thompson. She prays that such letters may be granted to her, in pursuance of the statute in such case made and provided. And your petitioner will ever pray, &c.

Dated this twentieth day of February, 1855.

Jurat. (See No. 29.)

CORNELIA THOMPSON.

No. 38. P. 230.

LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED.

The people of the state of New York, to Cornelia Thompson, of the city of New York, sole residuary legatee under the last will and testament of James Thompson, late of the said city, merchant, deceased.

Whereas the said James Thompson lately departed this life, having previously duly made and executed his last will and testament: And whereas said will (a copy whereof is hereunto annexed) was, on the twenty-fifth day of August, in the year one thousand eight hundred and fifty-four, duly admitted to probate by Alexander W. Bradford, Esquire, surrogate of the county of New York, and probate and letters testamentary thereof were duly granted and issued by the said surrogate to Philip Thompson, the sole executor named in the said will: And whereas the said Philip Thompson lately departed this life, leaving property and assets of the said testator still unadministered: And whereas the said James Thompson, at or immediately previous to his death, was an inhabitant of the county of New York, by means whereof the proving and registering of said will, and the ordering and granting administration of all and singular the goods, chattels and credits whereof the said testator died possessed in the state of New York; and also the auditing, allowing, and final discharging the account thereof, doth appertain unto us; and we being desirous that said will should be

observed and performed, and that the goods, chattels and credits of said testator should be well and faithfully administered, applied and disposed of, do grant unto you, the said Cornelia Thompson, full power and authority, by these presents, to administer and faithfully to dispose of all and singular the said goods, chattels and credits, and to ask, demand, recover and receive, the debts which unto the said testator whilst living, and at the time of his death, did belong; and to pay the debts which the said testator did owe, as far as such goods, chattels and credits will thereto extend, and the law require; hereby requiring you to observe and perform the said last will and testament, and to observe and perform all the duties to which you would have been subject if you had been named the executrix thereof. And we do, by these presents, depute, constitute and appoint you, the said Cornelia Thompson, administratrix, with the will annexed, of all and singular the goods, chattels and credits, which were of said James Thompson, deceased.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, Alexander W. Bradford, surrogate of said county, [L. S.] at the city of New York, this twentieth day of February, in the year of our Lord one thousand eight hundred and fifty-five, and of our independence the seventy-ninth.

A. W. BRADFORD, *Surrogate*.

No. 39. P. 231.

PETITION FOR LETTERS OF COLLECTION.

County of New York.—Surrogate's Court.

IN THE MATTER OF THE GOODS, CHATTELS	}
AND CREDITS	
OF	
HENRY GRAY, DECEASED.	

To ALEXANDER W. BRADFORD, surrogate of the county of New York:

The petition of George Day, of the city of New York, respectfully sheweth, that your petitioner is sole executor named in the instrument in writing, purporting to be the last will and testament of Henry Gray, late of the city of New York, grocer, deceased, propounded for probate and now pending in the court of the surrogate of the county of New York. That the proof of the said will is contested, whereby a delay is necessarily produced in granting letters testamentary or of administration in this matter, and that it is uncertain when such contest will be terminated. That the property of the said deceased consists in part of groceries and perishable articles, and that it is necessary that immediate steps should be taken for the preservation or disposal thereof. That there are notes and debts belonging to the said deceased, falling due, the collection whereof requires early attention. That your petitioner has, to the best of his ability, estimated and ascertained the value of the personal property of which the said deceased died possessed, and that the same does not exceed in value the sum of about five thousand dollars.

Your petitioner further shows that the said deceased, at or immediately previously to his death, was an inhabitant of the county of New York, and that he is informed and believes that the surrogate of the county of New York has power in his discretion to issue special letters of administration, authorizing the preservation and collection of the goods of the deceased. He prays that such letters may be issued to him, pursuant to the statute in such case made and provided. And your petitioner will ever pray, &c.

Dated this sixth day of February, 1855.

GEORGE DAY.

Jurat. (See No. 29.)

ORDER FOR ISSUING LETTERS OF COLLECTION.

Title. (See above.)

At, &c. (See No. 3.)

On reading and filing the petition of George Day, the sole executor named in the instrument in writing, purporting to be the last will and testament of Henry Gray, late of the city of New York, deceased, now pending in this court, praying that special letters of administration authorizing the preservation and collection of the goods of the deceased may be issued to him; and the proof of the said will being contested, and a delay being necessarily produced in granting letters testamentary or of administration in this matter, and it appearing that the situation of the property of the said deceased requires that such letters should be issued, and on reading and filing the bond executed by the said petitioner, with two com-

petent sureties, pursuant to the statute in such case made and provided, it is ordered that the prayer of the said petition be granted, and that such letters issue to the said petitioner in pursuance thereof.

COLLECTOR'S BOND.

Kuow all men by these presents, that we, George Day, of the city of New York, physician, and William Martin and Robert Martin, of the same city, merchants, are held and firmly bound unto the people of the state of New York, in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said people, to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the seventh day of February, in the year one thousand eight hundred and fifty-four.

Whereas, the surrogate of the county of New York is about to issue special letters of administration to the above bounden George Day, authorizing the preservation and collection of the goods of Henry Gray, late of the city of New York, deceased, and appointing him collector of the said goods: Now the condition of this obligation is such, that if the said George Day shall make a true and perfect inventory of such of the assets of the said deceased as shall come to his possession or knowledge, and return the same within three months to the office of the said surrogate; and shall faithfully and truly account for all property, money and things in action, received by him as such collector, whenever required by the said surrogate, or any other court of competent authority, and faithfully deliver up the same to the person or persons who shall be appointed executors or administrators of the said deceased, or to such other person as shall be authorized to receive the same by the said surrogate, then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in }
the presence of }
GEORGE GREEN.

GEORGE DAY, [SEAL]
WILLIAM MARTIN, [SEAL]
ROBERT MARTIN. [SEAL]

Acknowledgment and affidavits of justification.—(See No. 23.)

No. 40. P. 231.

LETTERS OF COLLECTION.

The people of the state of New York, to George Day, sole executor named in the instrument in writing, purporting to be the last will and testament of Henry Gray, late of the city of New York, deceased, propounded for proof, and now pending before the surrogate of the county of New York.

Whereas, the proof of the said will is contested, and a delay is necessarily produced in granting letters testamentary of a will, or letters of administration of the goods, chattels and credits of the said Henry Gray, deceased, and it appearing that the situation of the property of the said deceased requires that special letters of administration, authorizing the preservation and collection of the goods of the deceased should be issued: And we being desirous that the goods, chattels, personal estate and debts of said deceased may be collected and preserved, do grant unto you, the said George Day, full power, by these presents, to collect, recover and receive the said goods, chattels, personal estate, and debts of the said deceased; and to secure the same at such reasonable expense as the surrogate of the county of New York shall allow; and to sell such of the said goods as are perishable, under the direction of the said surrogate, after the same shall have been appraised; hereby requiring you to make, or cause to be made, a true and perfect inventory of such of the assets of said deceased as shall come to your possession or knowledge, and return the same to our said surrogate, within three months from the date of these presents; and also faithfully and truly account for all property, money and things in action, received by you as collector, whenever required by our said surrogate, or any other court of competent authority; and faithfully to deliver up the same to the person or persons who shall be appointed executors or administrators of the said Henry Gray, deceased, or to such other person as shall be authorized to receive the same by said surrogate. And we do by these presents depute, constitute and appoint you, the said George Day, collector of all and singular the goods, chattels and credits which were of the said Henry Gray, deceased.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, Alexander W. Bradford, surrogate of said county, [SEAL] at the city of New York, this tenth day of February, in the year one thousand eight hundred and fifty-five, and of our independence the seventy-ninth.

A. W. BRADFORD, *Surrogate.*

INVENTORY.

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No. 41. P. 244.

ORDER FOR APPOINTMENT OF APPRAISERS.

At, &c. (See No. 3.)

IN THE MATTER OF THE ESTATE
OF
JAMES THOMPSON, DECEASED.

On the application of Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, to have two disinterested appraisers appointed to estimate and appraise the personal property of the said deceased, it is ordered that John A. Livingston and Cornelius Minor, both of the city of New York, be, and they are hereby appointed such appraisers.

No. 42. P. 245.

NOTICE OF APPRAISEMENT.

Notice is hereby given, that the executor of the last will and testament of James Thompson, late of the city of New York, deceased, with the aid of appraisers, for the purpose duly appointed by the surrogate of the county of New York, will, on the eighteenth day of August instant, at nine o'clock in the forenoon of that day, at number Broadway, in the city of New York, in said county, proceed to make an appraisal and inventory of all the goods, chattels and credits of the said deceased.

Dated this twelfth day of August, A. D. 1855.

PHILIP THOMPSON, *Executor.*

No. 43. Pp. 245, 254.

FORM OF COMPLETE INVENTORY.

OATHS OF APPRAISERS. (See. p. 80.)

County of New York, ss.—I, J. A. Livingston, of the city of New York, appraiser, duly appointed by the surrogate of the county of New York, do swear and declare that I will truly, honestly and impartially appraise the personal property of James Thompson, late of the county aforesaid, deceased, which shall be for that purpose exhibited to me, to the best of my knowledge and ability.

J. A. LIVINGSTON.

Sworn this fifteenth day of
August, 1855, before me, }

WILLIAM G. BANKS, *Commissioner of Deeds.*

Here follows the same oath of the other appraiser.

A TRUE AND PERFECT INVENTORY of all the goods, chattels and credits which were of James Thompson, late of the city of New York, deceased, made by the executor of the last will and testament of the said deceased, with the aid and in the presence of J. A. Livingston and Cornelius Minor, both of the city of New York, they having been duly appointed and sworn as appraisers: containing a full, just and true statement of all the personal property of the said deceased, which has come to the knowledge of the said executor, and particularly of all moneys, bank bills, and other circulating medium, belonging to the said deceased, and of all just claims of the said deceased against said executor, and of all bonds, mortgages, notes and other securities, for the payment of money belonging to the said deceased; specifying the names of the debtor in each security, the date, the sum originally payable, the indorsements thereon, with their dates, and the sum which, in the judgment of the appraisers, may be collectable on such security.

Upon the completion of this inventory, duplicates thereof have been made, and signed at the end thereof by the appraisers.

ARTICLES INVENTORIED.

The following articles are exempted from appraisement to remain in the possession of Cornelia Thompson, the widow of the testator, pursuant to the statute.

One mahogany table, six mahogany chairs, one mahogany French bedstead, and two other mahogany bedsteads, with their beds and necessary bedding. Six ivory handled knives, six silver forks, six China plates, six China tea cups and six China saucers, one silver sugar dish, one silver milk pot, one silver teapot and six silver table spoons. The family Bible, five family pictures, all school books, and sixty-eight books, the same not exceeding in value fifty dollars, and which were kept and used as part of the family library before the decease of the testator. Three stoves kept for use by the family. The following necessary cooking utensils (describe them.) The necessary wearing apparel and clothing of the family. The clothing of the widow and her ornaments.

In addition to the above enumerated articles exempt from appraisal, the appraisers, in the exercise of their discretion, pursuant to the statute, set apart the following articles of necessary household furniture and other personal property for the use of the widow and minor children of the testator, the same not exceeding in value one hundred and fifty dollars.

(Describe the articles.)

GENERAL INVENTORY.

Bond made by Jonathan Little to the testator, dated the first day of October, in the year 1839, conditioned for the payment of the sum of nine thousand dollars, on the first day of October, in the year 1840, with interest at the rate of seven per cent. per annum, payable half yearly: Secured by a mortgage of real estate in the city of New York, made by the said Jonathan Little and his wife, bearing even date with the bond	\$9,000 00
The payment of interest is indorsed on this bond up to the first day of April, 1855.	
Interest now due on this bond,	\$
Promissory note, made by Thomas Shaw to the testator, or order, dated the first day of February, 1843, for three thousand dollars, payable on demand, with interest,	3,000 00
Interest now due on this note,	\$
The following accounts are due to the testator:	
Account against John Green, 20th March, 1840,	125 00
" " Henry Jones, 15th April, 1843,	280 00
Twenty-five shares of the capital stock of the Greenwich Insurance Company, in the city of New York; certificate number 198; par value, twenty-five dollars each share; present actual value, one hundred and five per cent.,	656 25
Due to the testator, from Philip Thompson, the said executor, for money borrowed without interest, two thousand dollars,	2,000 00
The interest of the testator in the stock in trade, effects and credits of the late firm of "Thompson & Jones," hardware merchants, in the city of New York, composed of the said testator and Jacob Jones, and in which the said testator owned the one-half share, and interest.	
The accounts and affairs of the said partnership not having been adjusted and closed, the appraisers are not able to state the exact value of this interest. From the information they have obtained, the value of the said interest is, in their judgment, not less than ten thousand dollars,	10,000 00
Money—In specie, at the residence of the testator, at the time of his death,	220 00
Deposited in the Bank of America,	1,575 00
	<hr/> \$26,856 25
The following stocks, securities and accounts, the appraisers consider of no value:	
Thirty-two shares of the capital stock of the "President, Managers and Company for erecting a bridge over the River Delaware, near the town of Milford," of which the par value was \$50 per share.	
Bond made by James Hazen to the testator, dated the 21st June, 1835, conditioned for the payment of \$600, one year after the date, with interest.	
Promissory note made by Simon Ward, to the order of John King, and by him indorsed to the testator, dated 2d October, 1840, for \$400, payable six months after date, duly protested.	
Account against George Brown,	\$78
" " Thomas Jackson,	95
<i>Household Furniture—At No. Broadway, New York.</i>	
<i>First Floor—Front Parlor.</i>	
About sixty yards of Brussels carpet,	50 00

INVENTORY.

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Set of window curtains and ornaments,	-	-	-	-	-	\$150 00
Pair of window shades, \$6; mahogany sofa, \$25,	-	-	-	-	-	31 00
Two mahogany couches, \$10; rocking chair, \$7,	-	-	-	-	-	47 00
Six mahogany chairs, \$18; two mahogany tabouretts, \$8,	-	-	-	-	-	26 00
Large mirror, \$80; one pair of candelabras, \$40,	-	-	-	-	-	120 00
Mahogany stand, \$3; astral lamp, \$9,	-	-	-	-	-	12 00

Back Parlor, similar list, and so with the other rooms of the house.

Dated this day of

1855.

JOHN A. LIVINGSTON, }
CORNELIUS MINOR, } *Appraisers.*

No. 44. P. 254.

OATH TO INVENTORY.

State of New York, }
County of New York, } ss.

Philip Thompson, of the city of New York, being duly sworn, doth depose and say, that he is the executor of the last will and testament of James Thompson, late of the city of New York, deceased, and that the foregoing is an inventory of the personal property of the said deceased. That the said inventory is, in all respects, just and true; that it contains a true statement of all the personal property of the said deceased which has come to the knowledge of this deponent; and particularly of all money, bank bills and other circulating medium, belonging to the said deceased, and of all just claims of the said deceased against this deponent, according to the best of the knowledge of this deponent.

PHILIP THOMPSON.

Sworn this second day of September, }
1855, before me, }

WILLIAM RIPLEY, *Commissioner of Deeds.*

No. 45. P. 256.

PETITION FOR FURTHER TIME TO FILE INVENTORY.

County of New York, }
Surrogate's Court, }

TO ALEXANDER W. BRADFORD, Surrogate of the county of New York:

The petition of Eliza Kelly, of the city of New York, widow, respectfully sheweth:

That on the seventh day of February last past, your petitioner was duly appointed the administratrix of all and singular the goods, chattels and credits of John Kelly, late of the city of New York, gentleman, deceased, intestate, her late husband.

That the personal property of the said John Kelly consists for the most part of the undivided distributive share to which the said John Kelly was entitled in and of the personal estate of Patrick Kelly, lately deceased, intestate, his brother. That William Kelly was appointed by the said surrogate the administrator of all and singular the goods, chattels and credits of the said Patrick Kelly, deceased, on or about the first day of December, in the year 1854. That the period for the settlement of the estate of the said Patrick Kelly, deceased, has not yet arrived, and that the amount of the share thereof, to which the said John Kelly or his estate may be entitled, cannot yet be ascertained. That your petitioner will, therefore, be unable to exhibit a perfect inventory of the personal property of the said John Kelly, deceased, within the three months limited by law. Your petitioner prays that she may be allowed four months further time to return such inventory. And your petitioner will ever pray, &c.

Dated this first day of May, A. D. 1855.

ELIZA KELLY.

County of New York, ss.—On this first day of May, in the year 1855, personally appeared before me, Eliza Kelly, the petitioner above named, and made oath that she had read the foregoing petition, and knew the contents thereof, and that the matters of fact therein stated were true.

A. W. BRADFORD, *Surrogate.*

ORDER FOR FURTHER TIME TO RETURN INVENTORY.

At, &c. (See No. 3.)

IN THE MATTER OF THE INVENTORY OF
THE PERSONAL PROPERTY
OF
JOHN KELLY, DECEASED.

On reading and filing the petition of Eliza Kelly, the administratrix of all and singular the goods, chattels and credits of John Kelly, late of the city of New York, deceased, intestate, praying that she may be allowed four months further time to return an inventory of the personal property of the said intestate, and reasonable cause therefor being shown, it is ordered, that the said Eliza Kelly, administratrix as aforesaid, be allowed four months further time to return such inventory.

No. 46. P. 257.

PETITION TO COMPEL THE RETURN OF AN INVENTORY.

County of New York, }
Surrogate's Court. }

To A. W. B., Surrogate of the county of New York:

The petition of James Tucker, of the city of New York, respectfully sheweth that your petitioner is a creditor of Henry Jones, late of the city of New York, deceased, intestate, and that there is justly due to him from the estate of the said deceased, on a promissory note, made by the said Henry Jones in his lifetime, to your petitioner, the sum of two hundred and fifty dollars, and interest from the eighth day of October, in the year 1845.

Your petitioner further shows, that letters of administration of all and singular the goods, chattels and credits of the said Henry Jones, deceased, were, on the twenty-fourth day of March last past, granted, by the surrogate of the county of New York, to George Jones of the city of New York, grocer, the brother of the said intestate. That more than three months have elapsed since the granting of the said letters, and that the said George Jones has neglected to return an inventory of the personal property of the said intestate, and has not obtained an allowance of further time to do so.

In consideration of the premises, your petitioner prays that the surrogate will issue a summons, requiring the said administrator, at a short day therein to be appointed, to appear before him, and return an inventory of the personal property of the said intestate according to law, or show cause why an attachment should not be issued against him; and that your petitioner may have such further or other relief in the premises as to the surrogate shall seem meet. And your petitioner will ever pray, &c.

Dated this first day of July, A. D. 1855.

JAMES TUCKER.

The usual jurat.

No. 47. P. 257.

ORDER FOR ISSUING SUMMONS.

At, &c. (See No. 3.)

IN THE MATTER OF THE GOODS, CHATTELS
AND CREDITS
OF
HENRY JONES, DECEASED.

On reading and filing the petition of James Tucker, a creditor of Henry Jones, late of the city of New York, deceased, intestate, it is ordered, pursuant to the prayer of the said petition, that a summons issue to George Jones, the administrator of all and singular the goods, chattels and credits of the said intestate, requiring him personally to appear in this court on the ninth day of July instant, at ten o'clock in the forenoon of that day, and return an inventory according to law of the personal property of the said intestate, or show cause why an attachment should not be issued against him.

INVENTORY,

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SUMMONS ON THE ABOVE ORDER.

The people of the state of New York, to George Jones, the administrator of all and singular the goods, chattels and credits of Henry Jones, late of the city of New York, deceased, intestate, send greeting:

You are hereby summoned and required personally to be appear before our surrogate of the county of New York, at his office in the city of New York, on the ninth day of July instant, at ten o'clock in the forenoon of that day, and return an inventory, according to law, of the personal property of the said intestate, or show cause why an attachment should not be issued against you.

In testimony whereof, &c.

No. 48. P. 260.

ORDER FOR ATTACHMENT FOR NOT RETURNING INVENTORY.

Title. (See No. 47.)

At, &c. (See No. 3.)

A summons having been heretofore duly issued to George Jones, the administrator of all and singular the goods, chattels and credits of Henry Jones, late of the city of New York, deceased, intestate, requiring him personally to appear in this court on this day, at ten o'clock in the forenoon, and return an inventory, according to law, of the personal property of the said intestate, or show cause why an attachment should not be issued against him: And now, on reading and filing the affidavit of James Den, proving the due and personal service of the said summons on the said George Jones, on the day of instant; and the said George Jones having failed to appear and return such inventory on oath, in compliance with the exigency of the said summons, and not having obtained further time to return the same, it is ordered that an attachment issue out of and under the seal of this court, against the said George Jones, administrator as aforesaid, to be directed to the sheriff of the city and county of New York, commanding him to attach the said administrator, and commit him to the common jail of this county, there to remain until he shall return such inventory aforesaid, on oath, according to law.

ATTACHMENT ON THE ABOVE ORDER.

The people of the state of New York, to the sheriff of the city and county of New York, greeting: We command you that you attach George Jones, the administrator of all and singular the goods, chattels and credits of Henry Jones, late of the city of New York, deceased, intestate, if he shall be found in your bailiwick, and commit him to the common jail of the city and county of New York, there to remain until he shall return an inventory, on oath, according to law, of the personal property of the said intestate, in compliance with the exigency of a summons heretofore duly issued by our surrogate of the county of New York, directed to him, requiring him to appear before him on a certain day, now past, and return such inventory, or show cause why an attachment should not be issued against him, and duly and personally served on the said George Jones, before the return day thereof, as appears by satisfactory proof of such service, duly taken and had before our said surrogate, and for disobedience to which said summons this attachment is issued, pursuant to the statute in such cases made and provided; letters of administration of all and singular the goods, chattels and credits of the said intestate having been heretofore, in due form of law, granted and issued by the said surrogate to the said George Jones: And you are to make and return to our said surrogate, in the Surrogate's Court of the county of New York, on Monday, the day of instant, wheresoever the said court shall then be, a certificate, under your hand, of the manner in which you shall have executed this writ; and have you then and there this writ.

In testimony whereof, &c.

The attachment must be indorsed as follows:

Surrogate's Court—County of New York.

IN THE MATTER OF THE GOODS, CHATTELS
AND CREDITS
OF
THOMAS BROWN, DECEASED.

Attachment against George Jones, administrator, &c., of Thomas Brown, deceased, intestate, for not returning an inventory of the personal property of the said deceased.

A. W. B., *Surrogate.*

ORDER FOR THE ISSUING OF A REVOCATION OF LETTERS.

*Title. (See No. 47.)**At, &c. (See No. 3.)*

A summons having heretofore been duly issued out of this court, to George Jones, the administrator of all and singular the goods, chattels and credits of Henry Jones, late of the city of New York, deceased, intestate, requiring him to appear in this court, on the day of last past, and return an inventory, according to law, of the personal property of the intestate, or show cause why an attachment should not be issued against him; and satisfactory proof of the due and personal service of the said summons on the said George Jones having been produced and filed; and the said George Jones having failed to appear and return such inventory, on oath, in compliance with the exigency of the said summons; and not having obtained further time to return the same; and an attachment having thereupon duly issued out of this court, directed to the sheriff of the city and county of New York, commanding him to attach the said George Jones, and commit him to the common jail of the said county, there to remain until he should return such inventory aforesaid, on oath, according to law, in compliance with the exigency of the said summons; and the said sheriff having duly returned the said attachment, with his return thereon indorsed, that he had attached the said George Jones, and committed him to the said jail, as thereby commanded, on the day of last past; and the said George Jones, after being so committed to prison, having neglected for thirty days to make and return such inventory aforesaid, and not having yet returned the same, it is ordered and decreed, and the surrogate of the county of New York, by virtue of the power in him vested, and in pursuance of the statute in such case made and provided, doth order and decree, that the letters of administration of all and singular the goods, chattels and credits of the said Henry Jones, deceased, intestate, heretofore granted and issued to the said George Jones, bearing date the day of last past, be revoked, and that a revocation of the said letters issue under his seal of office.

REVOCATION. (See p. 261.)

The people of the state of New York, to all to whom these presents shall come or may concern, send greeting:—

Whereas, letters of administration of all and singular the goods, chattels and credits of Henry Jones, late of the city of New York, deceased, intestate, were on the day of in the year one thousand eight hundred and fifty-four, duly granted and issued by our surrogate of the county of New York, to George Jones, of the city of New York, grocer, the brother of the said intestate.

And whereas a summons was heretofore duly issued by our said surrogate, directed to the said George Jones, administrator of all and singular the goods, chattels and credits of the said intestate, requiring him to appear before him on the day of last past, at ten o'clock in the forenoon, and return an inventory, according to law, of the personal property of the said intestate, or show cause why an attachment should not be issued against him; which said summons was duly and personally served upon the said George Jones, before the return day thereof, as appears by satisfactory proof of such service, duly taken and had before our said surrogate. And whereas the said George Jones failed to appear and return such inventory, in compliance with the exigency of the said summons, and did not obtain further time to return the same; whereupon an attachment was duly issued by our said surrogate, under his seal of office, directed to the sheriff of the city and county of New York, commanding him to attach the said George Jones, and commit him to the common jail of the said county, there to remain until he should return such inventory aforesaid, on oath, according to law, in compliance with the exigency of the said summons. And whereas the said sheriff did make return of the said attachment, that he had attached the said George Jones, and committed him to the said jail, as thereby commanded, on the day of last past. And whereas the said George Jones, after being committed to prison, did neglect for thirty days to make and return such inventory aforesaid, and has not yet returned the same. Now, therefore, know ye, that in pursuance of the statute in such case made and provided, the said letters of administration of all and singular the goods, chattels and credits of the said Henry Jones, deceased, intestate, so as aforesaid granted and issued, by the surrogate of the county of New York, to the said George Jones, bearing date the day of in the year one thousand eight hundred and fifty-five, are hereby revoked, and that the said George Jones is hereby de-

ENFORCING PAYMENT OF JUDGMENT.

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prived of all power, authority and control over the goods, chattels and credits of the said Henry Jones, deceased.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, A. W. B., Esquire, surrogate of our said county, at the
[SEAL.] city of New York, this day of in the year of our Lord
one thousand eight hundred and fifty- and of our independence the
A. W. B.(u)

No. 50. P. 277.

SURROGATE'S CERTIFICATE OF APPOINTMENT OF AN ADMINISTRATOR OR EXECUTOR.

The people of the state of New York, to all to whom these presents shall come or may concern, send greeting :

Know ye, that at the county of New York, on the day of in the year one thousand eight hundred and fifty- letters [*] of administration of all and singular the goods, chattels and credits of John Kelly, late of the city of New York, gentleman, deceased, intestate, were duly granted by the surrogate of the county of New York to Eliza Kelly, the widow of the said intestate, and that the same are still valid and in full force.

In testimony whereof, we have caused, &c.

Or proceeding from the [] testamentary of the last will and testament of James Thompson' late of the city of New York, merchant, deceased, were duly granted and issued by the surrogate of the county of New York, to Philip Thompson, sole executor in the said will named, and that the same are still valid, and in full force.*

In testimony whereof, we have caused, &c.

No. 51. P. 337.

APPLICATION BY A CREDITOR WHO HAS OBTAINED A JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, AFTER A TRIAL AT LAW UPON THE MERITS, FOR AN ORDER THAT EXECUTION ISSUE.

*County of New York, }
Surrogate's Court. }*

To A. W. B., Surrogate of the County of New York :

The petition of Henry Thorn, of the city of New York, respectfully sheweth : That on the day of in the year one thousand eight hundred and fifty- in the term of in the said year, your petitioner, in the Superior Court of the city of New York, obtained a judgment, after a trial at law upon the merits, against Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, for five hundred and twenty dollars and thirty-seven cents damages and costs, on a promissory note made by the said James Thompson, in his lifetime, to your petitioner, as by the record and proceedings, now on file in the office of the clerk of the said court, in the city of New York, reference being thereunto had, and to which, for greater certainty, your petitioner prays leave to refer, doth and may more fully and at large appear.

Your petitioner further shows, that the said judgment still remains in full force, and has not been in any way paid or satisfied.

In consideration of the premises, and to the end that an order may be duly made, that an execution be issued upon the said judgment for the amount thereof, or for the amount of the assets of the estate of the said James Thompson, deceased, in the hands of the said executor, properly applicable to the payment, in whole or in part, of the said judgment; your petitioner applies to the surrogate, pursuant to the statute in such case made and provided, for an order against the said Philip Thompson, executor as aforesaid, to show cause why an execution on the said judgment should not be issued; and he further prays that a citation may issue out of, and under the seal of this court, to be directed to the said executor, requiring

(u) These forms for the revocation of the letters granted to an executor or administrator, may be adapted to the kindred cases of revocation, where an executor or administrator neglects or refuses to pay a legacy, or to render an account, pursuant to an order of the surrogate. (See pp. 404, 419, 455.)

him, at a certain time and place therein to be named, to appear and account before the said surrogate; and that your petitioner may have such further or other relief in the premises as to the surrogate shall seem meet.

And your petitioner will ever pray, &c.

Dated this day of 1855.

The usual jurat.

HENRY THORN.

ORDER TO SHOW CAUSE ON THE ABOVE PETITION.

At, &c. (See No. 3.)

IN THE MATTER OF THE APPLICATION OF
HENRY THORN, FOR AN ORDER THAT
EXECUTION ISSUE UPON A JUDGMENT OBTAINED BY HIM AGAINST PHILIP THOMPSON, THE EXECUTOR OF THE LAST WILL AND TESTAMENT
OF
JAMES THOMPSON DECEASED.

On reading and filing the petition of Henry Thorn, of the city of New York, setting forth that on the day of in the year one thousand eight hundred and fifty- he obtained a judgment in the Superior Court of the city of New York, after a trial at law upon the merits, against Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, for five hundred and twenty dollars and thirty-seven cents damages and costs: It is ordered, pursuant to the prayer of the said petition, that the said Philip Thompson, executor as aforesaid, personally be and appear before the surrogate of the county of New York, at his office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day, and show cause why an execution on the said judgment should not be issued.

A. W. B., Surrogate.

ORDER ON THE SAME PETITION THAT A CITATION ISSUE.

Title. (See last order.)

At, &c. (See No. 3.)

On reading and filing the petition of Henry Thorn, of the city of New York, setting forth that he has recovered a judgment, after a trial at law upon the merits, against Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased: It is ordered, pursuant to the prayer of the said petition, that a citation issue to the said Philip Thompson, executor as aforesaid, requiring him to appear in this court on the day of next, (the return day of the above order,) at ten o'clock in the forenoon of that day, and account as such executor.

CITATION ON THE ABOVE ORDER.

The people of the state of New York, to Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, send greeting:

You are hereby cited and required personally to be and appear before our surrogate of the county of New York, at his office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day, then and there to account as such executor.

In testimony whereof, we have caused, &c.

[L. s.]

A. W. BRADFORD.

No. 52. p. 339.

ORDER THAT AN EXECUTION ISSUE UPON A JUDGMENT OBTAINED AGAINST AN EXECUTOR AFTER A TRIAL AT LAW UPON THE MERITS.

Title. (See order to show cause.)

At, &c. (See No. 3.)

It appearing that Henry Thorn, of the city of New York, on the day of in the year one thousand eight hundred and fifty- obtained a judgment in the Superior Court of the city of New York against Philip Thompson, the executor of the last will and

NOTICE TO CREDITORS.

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testament of James Thompson, late of the city of New York, deceased, after a trial at law upon the merits, for five hundred and twenty dollars and thirty-seven cents damages and costs; and, on the application of the said Henry Thorn, an order having been heretofore duly made against the said executor, and served upon him, to show cause why an execution on the said judgment should not be issued; and a citation having also been issued and served upon the said executor, requiring him to appear in this court on the day of last past, and account as such executor; and the said parties having duly appeared, and the said Philip Thompson having produced and filed his account as such executor aforesaid; and the said matter having been heard on several days, and duly adjourned from day to day until this day; and it appearing, from the said account, that there are in the hands of the said Philip Thompson, as such executor, assets of the estate of the said James Thompson, deceased, to the amount of three thousand two hundred and fifty dollars; and that the debts and outstanding liabilities of the said deceased do not exceed the sum of two thousand three hundred dollars; and that there are assets in the hands of the said executor, properly applicable to the payment in full of the said judgment; and, no cause to the contrary being shown, it is ordered, and the surrogate, pursuant to the statute in such case made and provided, doth order, that execution be issued in due form of law against the said Philip Thompson, executor as aforesaid, for the whole amount of the said judgment and interest.

And it is further ordered, that the fees and expenses of this proceeding be paid out of the estate of the said deceased.

No. 53. P. 351.

ORDER TO ADVERTISE FOR CLAIMS.

Title. (See No. 41.)

At, &c. (See No. 3.)

On the application of Philip Thompson, setting forth, among other things, that six months and upwards had elapsed since he was appointed the executor of the said deceased; and that he was desirous of giving such notice to the creditors of the said deceased, to present their claims as is authorized by law; and that he had selected the newspaper, printed in the county of New York, called the "New York Daily Tribune," for the purpose of publishing such notice; and praying that the surrogate would make an order directing such notice published in such other newspapers as he might deem necessary to give notice to said creditors: It is ordered, that the said executor insert a notice, once in each week for six months, in the said "New York Daily Tribune," and also in the "Evening Post," requiring all persons having claims against said deceased to present the same, with the vouchers thereof, to the said executor, at his place of residence or place of transacting business, to be specified in such notice, on or before a day therein mentioned, which shall be at least six months from the day of the first publication of said notice.

A. W. B.

NOTICE TO CREDITORS.

Notice is hereby given, according to law, to all persons having claims against James Thompson, late of the city of New York, merchant, deceased, that they are required to exhibit the same, with the vouchers thereof, to the subscriber, the executor of the last will and testament of the said deceased, at his store and place of transacting business, number 49 Front street, in the city of New York, on or before the day of next, (six months from the first publication of the notice.)

Dated this day of A. D. 1855.

PHILIP THOMPSON, Executor.

No. 54. P. 351.

AFFIDAVIT OF CREDITOR TO HIS CLAIM.

City and County of New York, ss.—George Bruce, of the city of New York, being duly sworn, doth depose and say that the foregoing claim against the estate of William Walsh, deceased, is justly due and owing to this deponent; that no payments have been made thereon, and that there are no off-sets against the same, to the knowledge of this deponent.

GEORGE BRUCE.

Sworn this day of
A. D. 1855, before me,
JOHN KNOX, Commissioner of Deeds.

APPENDIX.

No. 55. P. 354.

AGREEMENT TO REFER CLAIM.

Whereas George Bruce has lately presented a claim to Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, against the said James Thompson, upon a promissory note made by the said James Thompson in his lifetime, to the claimant, or order, for six hundred dollars, dated the fourteenth day of October, 1853, and payable in thirty days after date, claiming of the said executor the whole amount of the said note, with interest from the time the same became due; and whereas the said executor doubts the justice of the said claim, alleging that the said note is not a valid claim against the said deceased or his intestate: It is thereupon agreed, in conformity with the statute in such cases made and provided, by and between the said George Bruce and the said Philip Thompson, executor as aforesaid, that the said matter in controversy be referred, pursuant to the statute aforesaid, to James Black, of the city of New York, counsellor at law, and William Andrews and Stephen Long, of the same city, merchants, three disinterested persons, as referees, to hear and determine upon the same with all convenient speed.

Dated this day of A. D. 1855.

GEORGE BRUCE,
PHILIP THOMPSON.

APPROVAL OF THE SURROGATE.

The surrogate of the county of New York hereby approves of the three persons named as referees in the foregoing agreement.

Dated this day of A. D. 1855.

A. W. B., *Surv.*

No. 56. P. 359.

APPLICATION FOR PROOF OF A DEBT DUE FROM THE DECEASED TO AN ADMINISTRATRIX.

*County of New York, }
Surrogate's Court. }*

TO ALEXANDER W. BRADFORD, Surrogate of the County of New York:

The petition of Mary Nelson, of the city of New York, respectfully sheweth, that she is the administratrix of all and singular the goods, chattels and credits of Thomas Brown, late of the city of New York deceased, intestate; that the said intestate died indebted to your petitioner in the sum of three hundred dollars and interest, due upon a promissory note made by him in his lifetime to your petitioner, dated the second day of May, 1850, for \$300, payable on demand, with interest; that the said sum is justly due and owing to your petitioner; that no payments have been made thereon, and that there are no off-sets against the same, to the knowledge of your petitioner.

Your petitioner further shows, that there are no other creditors of the said intestate, according to the best of her knowledge; that she has advertised, pursuant to the statute, for claims against him, and that none have been exhibited; and that Benjamin Brown, residing in the city of Poughkeepsie, in the county of Dutchess, and Reuben Brown, residing in the city of Buffalo, in the county of Erie, his brothers, and your petitioner, his sister, are the only persons entitled to share in the distribution of the personal property of the said intestate. (v)

In consideration of the premises, and to the end that your petitioner may retain a part of the property of the said intestate, in satisfaction of her said debt or claim, your petitioner prays that a citation may issue out of and under the seal of this court, pursuant to the statute in such case made and provided, to be directed to the proper persons, requiring them to appear before the surrogate, and attend the proof of the said debt or claim of your petitioner against the said intestate. And your petitioner will ever pray, &c.

Dated this day of 1855.

MARY NELSON.

The usual jurat.

(v) If there be a co-executor or co-administrator, that fact, and his name and residence, should be set forth in the petition, and he should be made a party to the proceeding; and, if such co-executor or administrator assent to the claim, it should be so stated in the petition.

ORDER FOR CITATION.

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ORDER FOR CITATION ON THE ABOVE PETITION.

At, &c. (See No. 3.)

IN THE MATTER OF THE PROOF OF THE DEBT
OR CLAIM OF MARY NELSON, ADMINISTR-
ATRIX, &c., OF THOMAS BROWN, DECEASED,
INTESTATE AGAINST THE SAID INTESTATE.

On reading and filing the petition of Mary Nelson, the administratrix of all and singular the goods, chattels and credits of Thomas Brown, late of the city of New York, deceased, intestate, setting forth that she has a claim against the said intestate, it is ordered, pursuant to the prayer of the said petition, that a citation issue to the proper persons, requiring them to appear in this court on the day of next, at ten o'clock in the forenoon of that day, and attend the proof of the said debt or claim of the said administratrix.

And it is further ordered, that the said citation be served on the persons to whom the same shall be directed, at least fifteen days before the return day thereof.

CITATION ON THE ABOVE ORDER.

The people of the state of New York, to Benjamin Brown, residing in the city of Poughkeepsie, in the county of Dutchess, and Reuben Brown, residing in the city of Buffalo, in the county of Erie, send greeting:

You and each of you are hereby cited and required personally to be and appear before our surrogate of the county of New York, at his office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day, then and there to attend the proof of the debt or claim of Mary Nelson, the administratrix of all and singular the goods, chattels and credits of Thomas Brown, late of the city of New York, deceased, intestate, against the said intestate.

In testimony whereof, we have caused, &c.

[L. S.]

A. W. B.

No. 57. P. 344.

PETITION OF A CREDITOR FOR A DECREE FOR PAYMENT OF HIS DEBT.

County of New York, }
Surrogate's Court. }

TO ALEXANDER W. BRADFORD, Surrogate of the County of New York:

The petition of John Rudd, of the city of New York, merchant, respectfully sheweth that your petitioner is a creditor of James Thompson, late of the city of New York, deceased; that he has a valid claim against the said deceased, on a promissory note made by the said James Thompson in his lifetime, to the order of your petitioner, dated the day of

1855 for six hundred dollars, payable six months after date; that the said claim is justly due and owing to your petitioner; that no payments have been made thereon, and that there are no off-sets against the same, to the knowledge of your petitioner; that letters testamentary of the last will and testament of the said James Thompson, deceased, were duly granted, by the surrogate of the county of New York, to Philip Thompson, sole executor in the said will named, on the day 1855; that your petitioner duly exhibited the said claim to the said executor, under the notice published by him for the exhibition of claims, and that he assented to the justness and correctness of the same; that your petitioner has demanded payment of the said claim from the said executor, since the expiration of one year from the time of the granting of the letters testamentary aforesaid to him, and that he has neglected to pay the same.

Your petitioner further shows, that he is informed and believes that ample assets for the payment of all claims against the said James Thompson, deceased, have come into the hands of the said Philip Thompson, as such executor aforesaid.

In consideration of the premises, your petitioner prays that a decree may be made, pursuant to the statute in such case made and provided, against the said executor, for the payment of the said claim of your petitioner.

And your petitioner will ever pray, &c.

Dated this day of 1855.

The usual jurat.

JOHN RUDD.

No. 58. P. 345.

ORDER FOR CITATION ON THE ABOVE PETITION.

At, &c. (See No. 3.)

<p>IN THE MATTER OF THE CLAIM OF JOHN RUDD, A CREDITOR OF JAMES THOMPSON, DECEASED.</p>

On reading and filing the petition of John Rudd, of the city of New York, merchant, a creditor of James Thompson, late of the city of New York, deceased, setting forth that he has a just claim against the said deceased, it is ordered that a citation issue to Philip Thompson, the executor of the last will and testament of the said James Thompson, deceased, requiring him to appear in this court, on the _____ day of _____ instant, at ten o'clock in the forenoon of that day, and show cause why the surrogate should not decree payment of the said debt or claim against him.

And it is further ordered, that the said citation be served on the said Philip Thompson, at least four days before the return day thereof.

CITATION ON THE ABOVE ORDER.

The people of the state of New York, to Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, send greeting:

You are hereby cited and required personally to be and appear before our surrogate of the county of New York, at his office in the city of New York, on the _____ day of _____ instant, at ten o'clock in the forenoon of that day, then and there to show cause why the said surrogate should not decree payment against you of the debt or claim of John Rudd, of the city of New York, merchant, against the said James Thompson, deceased, upon an alleged promissory note made by the said James Thompson, in his lifetime, to the order of the said John Rudd, for six hundred dollars.

In testimony whereof, we have caused, &c.

A. W. B.

No. 59. P. 346.

DECREE FOR PAYMENT OF A CLAIM.

*Title. (See No. 58.)**At, &c. (See No. 3.)*

John Rudd, of the city of New York, merchant, having heretofore presented his petition to the surrogate of the county of New York, setting forth that he had a valid claim against James Thompson, late of the city of New York, deceased, upon a promissory note made by the said James Thompson, in his lifetime, to the order of the said petitioner, dated the _____ day of _____ for six hundred dollars, payable six months after date, and praying a decree against Philip Thompson, the executor of the last will and testament of the said James Thompson, deceased, for payment of the said claim: And the said executor having been duly cited to appear on the _____ day of _____ last past, and show cause why such payment should not be decreed: And the said Philip Thompson having appeared, and having assented to the said claim of the said John Rudd, and having produced and filed an account as such executor; and the said matter having been heard on several days, and duly adjourned until this day; and it appearing, from the said account and from the proofs herein taken, that there are in the hands of the said Philip Thompson, as such executor aforesaid, assets of the estate of the said James Thompson, deceased, to the amount of two thousand seven hundred and twenty-five dollars, and that the debts and outstanding liabilities of the said deceased do not exceed the sum of one thousand seven hundred dollars: It is ordered and decreed, and the surrogate of the county of New York, by virtue of the power in him vested, doth order and decree, pursuant to the statute in such case made and provided, that the said Philip Thompson, executor as aforesaid, pay to the said John Rudd the full amount of his said claim and interest, amounting in the whole to the sum of _____ dollars and _____ cents.

And it is further ordered, that the said Philip Thompson personally pay the fees of this proceeding, and the costs of the said John Rudd therein to be taxed.

No. 60. P. 408.

BOND TO REFUND LEGACY WHERE THE SAME IS DIRECTED TO BE PAID BEFORE THE EXPIRATION OF THE YEAR.

Know all men by these presents, that we, Henry Tompkins, of the city of New York, grocer, and George Storms, of the same place, saddler, and John Baker, of the same place, cooper, are held and firmly bound unto Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Philip Thompson as such executor aforesaid, or to his certain attorney, successor or assigns; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated the day of one thousand eight hundred and fifty-

Whereas, the said James Thompson, in and by his said last will and testament, did give and bequeath to the said Henry Tompkins, the sum of five hundred dollars, to be paid to him in two months after the decease of the said James Thompson: And whereas the said Henry Tompkins has demanded payment of the said legacy from the said executor before the expiration of one year from the time of the granting of his letters testamentary of the said last will and testament, and the said executor is about to pay the same, pursuant to the statute in such case made and provided, upon the execution and delivery of this obligation.

Now, the condition of this obligation is such, that if any debts against the said deceased shall duly appear, and which there shall be no other assets to pay, and there shall be no other assets to pay other legacies, or not sufficient, and the said Henry Tompkins shall refund the legacy so paid, or such ratable proportion thereof, with the other legatees, as may be necessary for the payment of the said debts, and the proportional parts of such other legacies, and the costs and charges incurred by reason of the said payment to him; and, if the probate of the said will shall be revoked, or the will declared void, and the said Henry Tompkins shall refund the whole of the said legacy, with interest, to the executor or administrator entitled thereto, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed.)

Sealed and delivered, &c.

No. 61. P. 409.

APPLICATION BEFORE THE EXPIRATION OF THE YEAR BY A PERSON ENTITLED TO A LEGACY, TO RECEIVE A PORTION OF SUCH LEGACY AS NECESSARY FOR HIS SUPPORT.

County of New York, }
Surrogate's Court. }

TO ALEXANDER W. BRADFORD, Surrogate of the County of New York:

The petition of Samuel Reynolds, of the city of New York, respectfully sheweth: That your petitioner is a legatee under the last will and testament of James Thompson, late of the city of New York, deceased: that the said last will and testament was duly proved before the surrogate of the county of New York, and recorded in his office, on the day of in the year 185 , and that letters testamentary thereof, were on the same day duly granted and issued by the said surrogate to Philip Thompson, sole executor in the said will named. That in and by the said will, the said James Thompson did give and bequeath to your petitioner the sum of one thousand dollars, as by the said will, or the aforesaid record thereof, reference being thereto had, will more fully appear, and your petitioner prays leave to make such reference if it shall be necessary for him so to do.

Your petitioner further shows, that ample assets of the estate of the said testator for the payment of all his debts, and for the discharge of all the specific and general legacies given by his said will, have come into the hands of the said Philip Thompson, as such executor aforesaid.

Your petitioner further shows, that he is in indigent circumstances, and that an advance of a portion of the said legacy is necessary for his support. He therefore prays, that he may be allowed, in pursuance of the statute in such case made and provided, to receive a portion of the said legacy to the amount of three hundred dollars, as necessary for his support, upon a satisfactory bond being executed for the return of such portion, with interest, whenever required.

And your petitioner will ever pray, &c.

SAMUEL REYNOLDS.

On the copy of the petition served on the executor the following notice is to be indorsed :

SIR,—Take notice, that the petition, of which the within is a copy, will be presented to the surrogate of the county of New York, at his office in the city of New York, on Monday, the day of instant, at ten o'clock in the forenoon of that day, and that the said surrogate will then and there be moved to grant the prayer thereof. And further, that William Seaman, residing in the Tenth ward of the city of New York, merchant, and George Spicer, residing in the Fifteenth ward of the same city, gentleman, will be offered as sureties in the bond mentioned in the said petition, on the granting of the prayer thereof.

Dated this day of A. D. 185 .

Yours, &c.,
SAMUEL REYNOLDS, *Petitioner within named, or*
GEORGE BARKER, *Proctor for, &c.*

TO PHILIP THOMPSON, *Executor, &c., of James Thompson, deceased.*

BOND.

Know all men by these presents, that we, Samuel Reynolds, of the city of New York, carpenter, and William Seaman, of the same city, merchant, and George Spicer, of the same city, gentleman, are held and firmly bound unto Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, in the sum of six hundred dollars, lawful money of the United States of America, to be paid to the said Philip Thompson, as such executor aforesaid, or to his certain attorney, successors or assigns; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the day of one thousand eight hundred and fifty-

Whereas the said James Thompson, in and by his said last will and testament, did give and bequeath to the said Samuel Reynolds, the sum of one thousand dollars; and whereas the said legatee has lately applied to the surrogate of the county of New York, previous to the expiration of one year from the granting of the letters testamentary to the said executor, to be allowed to receive a portion of the said legacy, to the amount of three hundred dollars, as necessary for his support; and reasonable notice of the said application having been given to the said executor, and the said surrogate being about to allow the said portion of the said legacy to be advanced to the said legatee, pursuant to the statute in such case made and provided, upon the execution and delivery of this obligation:

Now, the condition of this obligation is such, that if the said Samuel Reynolds shall return the said portion of the said legacy, with interest, whenever required, then this obligation to be void, otherwise to remain in full force and virtue.

(Signed.)

Sealed and delivered, &c.

ORDER ALLOWING PAYMENT OF THE PORTION.

At, &c. (See No. 3.)

IN THE MATTER OF THE LEGACY OF SAMUEL
REYNOLDS, UNDER THE LAST WILL AND
TESTAMENT

OF

JAMES THOMPSON, DECEASED.

Samuel Reynolds, of the city of New York, carpenter, a legatee under the last will and testament of James Thompson, late of the city of New York, deceased, having lately made application to the surrogate of the county of New York, previous to the expiration of one year from the granting of the letters testamentary of the said last will and testament to Philip Thompson, the executor thereof, to be allowed to receive a portion of the legacy of one thousand dollars, given and bequeathed to him in and by the said last will and testament, to the amount of three hundred dollars, as necessary for his support; and reasonable notice of the said application having been given to the said executor, as appears by proof duly taken and filed herein; and it appearing that there is at least one-third more of assets of the estate of the said James Thompson, deceased, in the hands of the said Philip Thompson, as such executor aforesaid, than will be sufficient to pay all debts, legacies and claims against the said estate now known, and that the said sum of three hundred dollars is necessary for the support of the said legatee, and a satisfactory bond having been executed for the return of the said portion with interest whenever required, and no objection being made: It is ordered,

and the surrogate doth allow, that the said Philip Thompson, executor as aforesaid, advance and pay to the said Samuel Reynolds a portion of his said legacy, to the amount of three hundred dollars.

And it is further ordered, that the said Samuel Reynolds pay the fees and expenses of this proceeding.

No. 62. P. 454.

PETITION FOR ORDER TO ACCOUNT.

County of New York, }
Surrogate's Court, }

TO ALEXANDER W. BRADFORD, Surrogate of the County of New York :

The petition of William Thompson, of the city of New York, merchant, respectfully sheweth, that your petitioner is one of the residuary legatees under the last will and testament of James Thompson, late of the city of New York, deceased. That the said last will and testament was duly proved before the surrogate of the county of New York, and recorded in his office on the day of in the year 185 , and that letters testamentary thereof were on the same day duly granted and issued by the said surrogate to Philip Thompson, sole executor in the said will named, and that more than eighteen months have expired since the time of such appointment of the said executor. That in and by the said will the said James Thompson, after giving and bequeathing certain specific and general legacies to the persons therein named, did give and bequeath all the rest, residue and remainder of his personal property to his three sons, Philip Thompson, the said executor, Samuel Thompson, and William Thompson, your petitioner, to be equally divided between them, share and share alike, as by the said will, or the aforesaid record thereof, reference being thereto had, will more fully appear ; and your petitioner prays leave to make such reference, if it shall be necessary for him so to do.

Your petitioner further shows, that the said James Thompson left a large personal estate, amounting to more than ten thousand dollars, as by the inventory thereof, filed by the said executor in the office of the surrogate, will, reference being thereunto had, fully appear ; and that there is, or should be, a large amount of the said personal property remaining in the hands of the said executor, after paying all the debts of the said testator, and discharging and paying all the specific and general legacies bequeathed by his said will.

Your petitioner further shows, that he has frequently, and in a friendly manner, since the expiration of eighteen months from the time of the appointment of the said Philip Thompson as such executor aforesaid, applied to him for an account of his proceedings in the discharge of his said trust, and for payment of the share or portion of the personal property of the said testator due to your petitioner under such bequest aforesaid, but that the said Philip Thompson has heretofore refused to render such account or to make such payment.

In consideration of the premises, and to the end that the said Philip Thompson, executor, as aforesaid, may be required to pay to your petitioner the amount of your petitioner's said claim, under the said last will and testament of the said testator, your petitioner prays that an order may be granted requiring the said Philip Thompson, at a certain short day, to be therein specified, personally to appear in this court, and render an account of his proceedings as such executor aforesaid, and that such further or other proceedings, according to law, and pursuant to the practice of this court, may be thereon had, as may be requisite to enforce the payment of your petitioner's claim aforesaid, and as to the surrogate shall seem just and equitable.

And your petitioner will ever pray, &c.

Dated this day of A. D. 185 .

The usual jurat.

No. 63. P. 454.

ORDER TO ACCOUNT.

At, &c. (See No. 3.)

IN THE MATTER OF THE ESTATE
OF
JAMES THOMPSON, DECEASED.

On reading and filing the petition of William Thompson, of the city of New York, merchant, one of the residuary legatees under the last will and testament of James Thompson,

late of the city of New York, deceased; it is ordered, pursuant to the prayer of the said petition, that Philip Thompson, the executor of the last will and testament of the said James Thompson, deceased, personally be and appear before the surrogate of the county of New York, at his office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day, and render an account of his proceedings as such executor aforesaid, or show cause why an attachment should not issue against him. A. W. B.

ORDER FOR A CITATION TO ACCOUNT. (See p. 455.)

Title. (As above.)

At, &c. (See No. 3.)

On reading and filing the petition of William Thompson, of the city of New York, merchant, one of the residuary legatees under the last will and testament of James Thompson, late of the city of New York, deceased, it is ordered, that a citation issue to Philip Thompson, the executor of the said last will and testament, requiring him personally to be and appear in this court, on the day of next, at ten o'clock in the forenoon of that day, then and there to render an account of his proceedings as such executor, or show cause why an attachment should not issue against him.

CITATION TO ACCOUNT.

The People of the State of New York, by the grace of God free and independent:

To Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, send greeting:

You are hereby cited and required, personally to be and appear before our surrogate of the county of New York, at his office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day, and then and there to render an account of your proceedings as such executor, or show cause why an attachment should not issue against you.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, Alexander W. Bradford, surrogate of our said county, at [SEAL] the surrogate's office in the city of New York, the day of in the year one thousand eight hundred and fifty- and of our independence the eighty-

ALEXANDER W. BRADFORD, *Surrogate.*(w)

No. 64. P. 464.

EXECUTOR'S APPLICATION FOR FINAL SETTLEMENT OF HIS ACCOUNT.

*County of New York, }
Surrogate's Court. }*

To A. W. B., Surrogate of the County of New York:

The petition of Philip Thompson, of the city of New York, respectfully sheweth, that he was duly qualified and appointed by the surrogate of the county of New York, as the executor of the last will and testament of James Thompson, late of the city of New York, deceased, on the day of in the year one thousand eight hundred and fifty- and that eighteen months and upwards have expired since such appointment.

Your petitioner further shows, that in and by his said last will and testament, the said James Thompson did dispose of his estate as follows: (*set forth the will, or so much thereof as directs the disposition of the personal property,*) as by the said last will and testament, and the probate thereof, now in the possession of your petitioner, or by the record of the same in the office of the surrogate, reference being thereunto had, will fully appear. And your petitioner prays leave to make such reference, if it shall be necessary for him so to do, for the purpose of a settlement of his accounts as such executor aforesaid (w)

Your petitioner further shows, that immediately after his appointment as such executor, he entered upon the duties of the trusts thereof [*] That he has been required by the surrogate to render an account of his proceedings as such executor, and that he desires to have his said account finally settled.

(w) The object of this part of the petition is stated at page 464, *ante*, and may, or may not, be deemed important. It may certainly be omitted where the estate has proved insufficient for the payment of the debts.

Your petitioner, therefore, applies to the surrogate, pursuant to the statute in such case made and provided, for a citation requiring the creditors, legatees and next of kin of the said James Thompson, deceased, to appear before the surrogate on some day therein to be specified, and to attend the settlement of such accounts.

And your petitioner will ever pray, &c.

Dated this day of A. D. 1854.

P. T.

If there has been no order to account, proceed from the [] as follows:* "And that he is prepared to render a final account of his proceedings as such executor. He therefore prays, that a citation may issue out of and under the seal of this court, to be directed to all persons interested in the estate of the said James Thompson, deceased, requiring them to appear in this court on a certain day to be therein specified, to attend the final settlement of the accounts of your petitioner as such executor aforesaid. And your petitioner will ever pray, &c.

Dated this day of A. D. 185 .

P. T.

No. 65. P. 466.

ORDER FOR ISSUING CITATION TO ATTEND FINAL SETTLEMENT.

At, &c. (See No. 3.)

IN THE MATTER OF THE ACCOUNTING OF
PHILIP THOMPSON, AS EXECUTOR OF THE
LAST WILL AND TESTAMENT
OF
JAMES THOMPSON, DECEASED.

On reading and filing the petition of Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, and eighteen months having expired since the time of the appointment of the said executor, [*] and the said Philip Thompson having been required to render an account of his proceedings as such executor, it is ordered, pursuant to the prayer of the said petition, that a citation issue requiring the creditors, legatees and next of kin of the said James Thompson, deceased, to appear in this court, on the day of next, at ten o'clock in the forenoon of that day, then and there to attend the final settlement of the account aforesaid.

CITATION.

The People of the State of New York, to the creditors, legatees and next of kin of James Thompson, late of the city of New York, deceased, send greeting:

You and each of you are hereby cited and required, personally to be and appear before our surrogate of the county of New York, at his office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day, then and there to attend the settlement of the account of Philip Thompson, as the executor of the last will and testament of the said James Thompson, deceased.

In testimony whereof, we have caused, &c.

[L. S.]

A. W. B.

If the executor render his account without being ordered to do so, the order for issuing the citation will be, proceeding from the [] as follows:* It is ordered, pursuant to the prayer of the said petition, that a citation issue to all persons interested in the estate of the said James Thompson, deceased, requiring them to appear in this court on the day of next, at ten o'clock in the forenoon of that day, to attend the final settlement of the accounts of the said Philip Thompson, as such executor aforesaid.

The citation in the last case will be as follows:

The People of the State of New York, to all persons interested in the estate of James Thompson, late of the city of New York, deceased, send greeting:

You and each of you are hereby cited and required personally to be and appear before our surrogate of the county of New York, at his office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day, then and there to attend the final settlement of the accounts of Philip Thompson, as the executor of the last will and testament of the said James Thompson, deceased.

In testimony whereof, we have caused, &c.

[L. S.]

A. W. B.

No. 66. Pp. 459, 471.

FORM OF AN ADMINISTRATOR'S ACCOUNT.

Dr.

The Estate of A. B., deceased, intestate, in account with C. D., Administrator, &c.

Cr.

1853.			
Aug. 14.	To cash paid surrogate's fees, on granting administration and appointing appraisers	\$11 12	
Oct. 2.	To cash paid for advertising notice of sale of stock, fixtures, &c., at the factory, in the Sun, Tribune and Courier.	4 26	\$543 47
"	" To cash paid for printing and circulating fifty handbills of the same sale.	1 50	31 96
16.	To cash paid E. F., the owner of the factory kept by the intestate, balance of two quarters' rent, due at the time administration was granted, with interest.	275 08	7 00
1854.			
Feb. 15.	To cash paid Evening Post and Courier newspapers, for advertising notice to creditors to exhibit their claims.	11 00	55 00
Sept. 2.	To cash paid surrogate's fee for certificate	50	
" 20.	To cash paid S. H. on account of his claim.	22 50	18 88
1855.			
Jan. 10.	To cash paid Mrs. A. C., executrix, &c., of F. C., deceased, on account of debt due by the intestate to the estate of the said F. C., deceased.	375 00	
Feb. 3.	To cash paid J. H., attorney, &c., for services, advice, costs, &c.	96 13	
	To balance to new account.	460 30	
		<u>\$1,256 38</u>	<u>\$1,256 38</u>
Feb. 15.		By balance brought down, amount now on hand, subject to the payment of expenses and administrator's commissions, and to distribution.	
		460 30	

The following claims exist against the estate of the said intestate:
[Give a list with the particulars of the claims.]

No. 67. Pp. 460, 472.

OATH TO ACCOUNT.

County of New York, ss.—James Hill, of the city of New York, being duly sworn, doth depose and say, that he is the administrator of all and singular, the goods, chattels and credits of Henry Lee, late of the city of New York, deceased, intestate, and that the annexed account is in all respects just and true; that the same, according to the best of his knowledge, information and belief, contains a full and true account of all his receipts and disbursements on account of the estate of the said deceased, and of all sums of money and property belonging to the estate of the said deceased, which have come into his hands as such administrator, or which have been received by any other person, by his order or authority, for his use; and that he doth not know of any error or omission in the said account, to the prejudice of any of the parties interested in the estate of the said deceased.

This deponent further says, that the sums under twenty dollars, charged in the said account, for which no vouchers or other evidences of payment are hereto annexed, or for which he may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged.

JAMES HILL.

Sworn this day of }
 A. D. 1855, before me, }
 A. W. B.

No. 68. P. 459, n., p. 471.

ACCOUNT RENDERED BY AN EXECUTOR OR ADMINISTRATOR ON A FINAL SETTLEMENT.

*Surrogate's Court, }
 County of New York. }*

IN THE MATTER OF THE ACCOUNTING OF JAMES
 HILL, AS THE EXECUTOR OF THE LAST WILL
 AND TESTAMENT OF
 HENRY LEE, DECEASED.

Account of Proceedings.

To the Surrogate of the County of New York:

I, James Hill, of the city of New York, do render the following account of my proceedings as administrator of Henry Lee, deceased, *for final settlement and allowance*:

On the day of in the year 185 , letters testamentary of the last will and testament of Henry Lee, late of the city of New York, deceased, were issued to me. On the day of A. D. 185 , I caused an inventory of the personal estate of the deceased to be filed in this office, which personal estate therein set forth amounts by appraisement, by the appraisers duly appointed, to \$

Schedule A, hereto annexed, contains a statement of all the property contained in said inventory, sold by me at public or private sale, with the prices and manner of sale; which sales were fairly made by me, at the best prices that could then be had, with due diligence, as I then believed. It also contains a statement of all the debts due the said estate and mentioned in said inventory, which have been collected, and also of all interest for moneys received by me for which I am legally accountable.

Schedule B, hereto annexed, contains a statement of all debts in said inventory mentioned, not collected or collectable by me, together with the reasons why the same have not been collected and are not collectable; and also a statement of the articles of personal property mentioned in said inventory unsold, and the reasons of the same being unsold, and their appraised value; and also a statement of all property mentioned therein lost by accident, without any wilful default or negligence, the cause of its loss and appraised value. No other assets than those in said inventory, or herein set forth, have come to my possession or knowledge, and all the increase or decrease in the value of any assets of said deceased is allowed or charged in said schedules A and B.

Schedule C, hereto annexed, contains a statement of all moneys paid by me for funeral and other necessary expenses for said estate, together with the reasons and object of such expenditure.

On or about the day of in the year 185 , I caused a notice for claimants to present their claims against the said estate to me within the period fixed by law, and at a certain place therein specified, to be published in two newspapers, according

to law, for six months, pursuant to an order of the surrogate of the county of New York; to which order, notice and due proof of publication, herewith filed, I refer as part of this account.

Schedule D, hereto annexed, contains a statement of all the claims of creditors presented to and allowed by me, or disputed by me, and for which a judgment or decree has been rendered against me, together with the names of the claimants, the general nature of the claim, its amount and the time of the rendition of the judgment; it also contains a statement of all moneys paid by me to the creditors of the deceased, and their names and the time of such payment.

Schedule E, hereto annexed, contains a statement of all moneys paid to the legatees, widow or next of kin of the deceased.

Schedule F, hereto annexed, contains the names of all persons entitled, as widow, legatee or next of kin of the deceased, to a share of his estate, with their places of residence, degree of relationship, and a statement of which of them are minors, and whether they have any general guardian, and if so, their names and places of residence, to the best of my knowledge, information and belief.

Schedule G, hereto annexed, contains a statement of all other facts affecting my administration of said estate, my rights, and those of others interested therein.

I charge myself—

Amount of inventory,	\$
" increase, as shown by Exhibit A,	

I credit myself—

Amount of loss on sales, as per Schedule B,	\$
" debts not collected, as per do.,	
" Schedule C,	
" Schedule D,	
" Schedule E,	

Leaving a balance of \$
to be distributed to those entitled thereto, subject to the deductions of the amount of my commissions, and the expenses of this accounting. The said schedules, which are severally signed by me, are part of this account.

Surrogate's Court—County of New York.

IN THE MATTER OF THE ACCOUNTING	}
OF	
OF	
DECEASED.	

City and County of New York, ss.—I, James Hill, of the city of New York, being duly sworn, say that the charges made in the foregoing account of proceedings and schedules annexed, for moneys paid by me to creditors, legatees and next of kin, and for necessary expenses, are correct; that I have been charged therein all the interest for moneys received by me and embraced in said account for which I am legally accountable; that the moneys stated in said account as collected were all that were collectable, according to the best of my knowledge, information and belief, on the debts stated in such account, at the time of this settlement thereof; that the allowances in said account for the decrease in the value of any assets, and the charges therein for the increase in such value, are correctly made; and that I do not know of any error in said account, or anything omitted therefrom, which may in anywise prejudice the rights of any party interested in said estate. And deponent further saith that the sums under twenty dollars charged in the said account, for which no vouchers or other evidences of payment are produced, or for which may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by him as charged.

Sworn this	day of	}
185 ,	before me,	

No. 69. P. 475.

ENTRY OF ISSUING SUBPENA ON AN ACCOUNTING.

Title. (See No. 68.)

At, &c. (See No. 3.)

William Thompson, the petitioner herein, having applied for a subpoena to be directed to Samuel Reynolds and James Clark, as witnesses on his part herein, it is ordered that a sub-

REFERENCE TO AUDITOR.

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pena issue accordingly, returnable the day of instant, at ten o'clock
in the forenoon.

SUBPENA.

Follow No. 9, except that in the place of "in the matter of proving," &c., insert, in the matter of the accounting of Philip Thompson, as the executor of the last will and testament of James Thompson, late of the city of New York, deceased.

No. 70. P. 476.

ORDER OF REFERENCE TO AN AUDITOR.

Title. (See No. 68.)

At, &c. (See No. 3.)

Philip Thompson, the executor of the last will and testament of James Thompson, late of the city of New York, deceased, having rendered his account of his proceedings as such executor, it is ordered that the said account be referred to William Talmadge, of the city of New York, counsellor at law, as auditor, to examine and report thereon.

It is further ordered, that the first hearing of this matter before the said auditor, take place at his office, number Wall street, in the city of New York, on the day of instant, at ten o'clock in the forenoon of that day, and that the said auditor bring in his report herein, before the surrogate, on the day of next, at ten o'clock in the forenoon, which last mentioned day is appointed for the hearing of the parties hereto, at the surrogate's office, in the city of New York, on the confirmation of the said report of the said auditor.

No. 71. P. 477.

FORM OF AN AUDITOR'S REPORT.

Before the Surrogate.

IN THE MATTER OF THE ACCOUNTING OF J.
W. S., THE ADMINISTRATOR OF ALL AND
SINGULAR THE GOODS, CHATTELS AND CRE-
DITS

OF
W. W., DECEASED.

I, the subscriber, an auditor appointed by the surrogate of the county of New York, to examine the accounts of J. W. S., administrator of the estate of W. W., deceased, and to make report thereon, do hereby respectfully report, that I have examined the said accounts, and have been attended upon said examination by the said administrator and by A. E. W., the widow of the said deceased, and by W. C. F., the guardian *ad litem* of the minor children of the said deceased, and by T. P. B., on the part of the executrix of F. C., deceased, a creditor; that the accounts of the said administrator, presented by him, are correct, with the following exceptions, that is to say:

1. That the claim made by A. C., executrix, and J. L., executor of F. C., deceased, should have been allowed by the said administrator at \$696 29, instead of \$701 48.
2. That from the bill of particulars of the item of \$95 13, charged in said administrator's account for cash paid J. H., attorney, &c., (which bill of particulars is annexed to the said administrator's account and marked G.,) there should be deducted the sum of \$5, the second item in said bill, which ought to be paid by the administrator personally, and not charged to the estate. And I also submit the propriety of the last charge in said bill of particulars, for the sum of ten dollars, to the decision of the surrogate, the same being for services rendered in his court, and to be allowed or disallowed according to whatever rule the surrogate adopts in such cases; I will only remark that I do not consider the charge unreasonable in amount for the services rendered. It is, however, objected to by the widow and the guardian for the children.

I do also further report, that from the testimony taken before me, it appears that the said administrator has used due diligence in endeavoring to collect the debts due to the estate, and that he has collected all of the same that were collectable.

I further report that the following are just claims against the said estate, with the exception that the administrator has paid, as stated in his account, to S. H., \$22 50, and to Mrs. A. C., executrix, &c., of F. C., deceased, \$375, which amounts are to be severally deducted from their respective distributive shares of said estate, that is to say:

C. & A.	22d June, 1852,	\$100 00
F. A. K.	6th September, 1852,	7 36
C. E. Q.	27th November, 1853,	50 15
I. P. S.	7th February, 1853,	45 87
S. H. S.	31st July, 1854,	53 75
H. C., executrix of F. C., deceased,	Jan. 8, 1855,	696 29

There is also a suit now pending in the Superior Court of the city of New York, brought by said administrator against H. L., a debtor of said estate, who defends said suit on the ground that he paid the demand to the widow of the deceased, before the appointment of the said administrator.

I further report that the payment of \$275 08, to Mrs. A. C., executrix, &c., for rent, was properly made, the goods and chattels of the estate of the said deceased being liable to be distrained if said rent was not paid.

And also, that the other charges in said account of the said administrator, for moneys paid for necessary expenses, not hereinbefore particularly referred to, are correct, and also, that the fixtures, stock, &c., at the factory belonging to the said estate, were sold in the usual manner at public auction, and that the ordinary means by advertising, &c., and due diligence and prudence were used in obtaining a just price for the same.

I do hereby further report, that the whole amount of the assets which have come to the hands of the said administrator, is \$1,294 57; that the amount of the administrator's commissions, is \$57 36; that the amount which I have allowed as properly paid for necessary expenses, is \$404 08, leaving a balance applicable to the payment of debts and the expenses of this accounting, and any other necessary expenses that may yet be incurred, of \$833 13, which may be further reduced if the item of ten dollars above submitted to the judgment of the surrogate should be allowed by him.

And I further report, that all the claims presented against the estate and allowed, amount to \$953 42, of which a portion has been paid as above stated.

All which is respectfully submitted.
New York, 1855.

J. W. W.

No. 72. P. 478.

EXECUTOR'S CLAIM AND OATH.

[State the particulars of the claim; if it be on an account, the dates and items on both the debit and credit side must be given; if it be on a note or other security, the date, the sum originally payable, the terms of payment, and the payments which may have been made, must be set forth.] The following oath is to be annexed:

County of New York, ss.—Philip Thompson, of the city of New York, being duly sworn, doth depose and say, that the foregoing claim against James Thompson, late of the city of New York, deceased, is in all respects just and true; and that the sum of _____ dollars and _____ cents, is now justly due to this deponent thereon, after allowing all payments and all proper discounts and off-sets against the same.

Sworn this _____ day of }
A. D. 1855, before me, }
A. W. B.

PHILIP THOMPSON.

No. 73. P. 230.

EXECUTOR'S RENUNCIATION OF A PROVISION MADE BY THE WILL FOR SPECIFIC COMPENSATION.

To all whom it may concern: Whereas James Thompson, late of the city of New York, deceased, in and by his last will and testament did give and bequeath to Philip Thompson, his executor therein named, the sum of two hundred and fifty dollars, for specific compensation for his services as such executor: Now know ye, that I, the said Philip Thompson, executor as aforesaid, divers good and sufficient causes me thereunto moving, do hereby renounce all right and claim to the said specific legacy.

Witness my hand this _____ day of _____ in the year one thousand eight hundred and forty.

PHILIP THOMPSON.

FINAL DECREES AND DECREES FOR DISTRIBUTION.

At, &c. (See No. 3.)

IN THE MATTER OF THE FINAL SETTLEMENT OF
THE ACCOUNTS OF C. D., ADMINISTRATOR OF
THE GOODS, &C.,
OF
A. B., DECEASED.

C. D., the administrator of all and singular the goods, chattels and credits of A. B., late of the city of New York, deceased, intestate, having heretofore duly rendered his account of his proceedings as such administrator, and a citation having been thereupon duly issued, pursuant to the statute, to all persons interested in the estate of the said deceased, and on the return of the said citation, on the day of last past, B. A., of the firm of C. & A., and F. A. R., creditors of the said intestate, having duly appeared in person, and W. C. F., having been duly appointed by the surrogate, the special guardian of the children and next of kin of the said intestate, for the sole purpose of appearing for them and taking care of their interests upon the settlement of the accounts aforesaid, the said children and next of kin being minors, and the said special guardian having duly appeared in behalf of the said minors, and the said matter having been duly adjourned from day to day, and the said administrator having filed his supplemental and explanatory account, and A. E. B., the widow of the said intestate, having appeared and disputed the said accounts, and A. C., the executrix of the last will and testament of F. C., deceased, a creditor of the said A. B., deceased, having appeared by T. P. B., her proctor and counsel, and the said accounts having been duly referred to I. W., Esquire, as auditor, and the said auditor having returned and filed his report thereon, which is dated the ninth day of April, instant, and which said report has been duly confirmed, and the charge of ten dollars, the allowance of which is thereby submitted to the judgment of the surrogate, having been disallowed, and the said matter having been duly adjourned to this day, and on motion of I. H., of counsel for the said administrator, it is ordered, adjudged and decreed, and the surrogate, by virtue of the power and authority in him vested, doth order, adjudge and decree, that the said accounts of the said administrator, as corrected and allowed by the said auditor, according to his said report, and after disallowing the said charge of ten dollars, be, and the same are hereby finally settled and allowed.

The following is a summary statement of the said accounts as settled and allowed, made and recorded, pursuant to the statute in such case made and provided, that is to say:

The total amount of the assets which have come into the hands of the said administrator, including proceeds of sale of the goods, &c., of the intestate, and all debts which were collectable, is one thousand two hundred and ninety-four dollars and fifty-seven cents	\$1,294 57
The total amount of the charges for necessary expenses as allowed, is four hundred and four dollars and eight cents	404 08
The commissions of the said administrator amount to fifty-seven dollars and thirty-six cents	57 36
	<hr/> 461 44 461 44 <hr/>

Leaving a balance to pay the costs and expenses of these proceedings, and for the purposes of distribution, of eight hundred and thirty-three dollars and thirteen cents	833 13
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The said administrator has paid on account of the debt due by the intestate to the executrix, &c., of F. C., deceased, the sum of three hundred and seventy-five dollars	375 00
--	--------

On account of debt due to S. H., the sum of twenty-two dollars and fifty cents	22 50
--	-------

\$397 50 397 50

Leaving a balance in the hands of the said administrator of four hundred and thirty-five dollars and sixty-three cents	435 63
The claims against the estate of the said A. B., deceased, and for which the assets which came to the hands of the said administrator, were	

liable, as settled and allowed as aforesaid, were as follows, that is to say:

C. & A.	22d June, 1852,	\$100 00
F. A. K.	6th Sept., 1852,	7 36
C. E. Q.	27th Nov., 1853,	50 15
J. P. S.	7th Feb., 1853,	45 87
S. H. S.	31st July, 1854,	53 75
A. C., executrix, &c., of F. C., deceased, 8th Jan'y, 1855,		696 29
		<hr/> \$953 42

Of which have been paid on account of the said claims of A. C., executrix, &c., and S. H. S.; as above set forth, the sum of . . . \$397 50

And it appearing that there is still pending and undetermined, a suit brought by the said administrator in the Superior Court of the city of New York, against H. L., to recover a debt due by the said H. L., to the said intestate, and the demand in controversy, in which said suit, if recovered and collected by the said administrator, will be assets in his hands applicable to the purposes of his administration: It is ordered, that all further proceedings in this matter be stayed until the determination of the said suit, and that the said matter stand adjourned until the . . . day of . . . next, at ten o'clock in the forenoon.

And it is further ordered, that the said administrator, out of the said balance of moneys so as aforesaid remaining in his hands, pay to the auditor aforesaid, the sum of six dollars and fifty cents, allowed to him for compensation for his services in this matter; and that out of the said moneys, he also pay the surrogate's fees and charges upon this proceeding, amounting to the sum of ten dollars and forty-five cents; and, also, that he retain out of the said balance of moneys, the sum of eight dollars and forty-five cents, allowed for his necessary and legal expenses incurred in conducting the said proceeding.

DECREE FOR DISTRIBUTION.

A4, &c. (See No. 3.)

IN THE MATTER OF THE FINAL SETTLEMENT OF
THE ACCOUNTS OF C. D., ADMINISTRATOR OF
THE GOODS, &c.

OF
A. B. DECEASED.

The accounts of C. D., administrator of all and singular the goods, chattels and credits of A. B., late of the city of New York, deceased, having been duly settled and allowed by the decree made in this matter on the eighteenth day of April, last past; and the said matter having been duly adjourned until this day; and the said administrator having appeared in person, and by J. H., his counsel, and E. B., the widow of the said deceased, W. C. F., the special guardian of the children of the said deceased, minors, and B. A., a creditor of the said deceased, having appeared in person, and A. C., the executrix, &c., of F. C., deceased, a creditor of the said deceased having appeared by I. K. P., her proctor: And it appearing that the suit mentioned in the said decree brought by the said administrator in the Superior Court of the city of New York, against H. L., has been terminated in favor of the defendant therein, and the said administrator having rendered a further account, and the same having been referred to J. W., Esquire, as auditor, and the said auditor having made his report: And it appearing from the said account and report, that the said administrator has received the sum of ten dollars and twenty-six cents, for interest on the sum of four hundred and ten dollars and twenty-three cents, remaining in his hands as such administrator at the time of the said decree, making the whole sum belonging to the estate of the deceased, for which the said administrator is now accountable, four hundred and twenty dollars and forty-nine cents; and that he has paid under the order of the said Superior Court, the referees' bill of fees in the said suit above mentioned, amounting to twenty-five dollars and seventy-four cents; and, also, the plaintiff's attorney's taxed bill of costs in the said suit, amounting to one hundred forty-one dollars and seventeen cents, leaving a balance now in the hands of said administrator, belonging to the estate of the said A. B., deceased, of two hundred and fifty-three dollars and fifty-eight cents. On motion of J. H., of counsel for the said administrator, it is ordered, adjudged and decreed, and the surrogate, by virtue of the power

DECREES ON ACCOUNTING.

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in him vested, doth order, adjudge and decree, that the said report be confirmed, and that the said account be, and the same is hereby finally settled and allowed.

And it is further ordered, that the said administrator, out of the said sum so remaining in his hands, pay to the auditor aforesaid, for compensation for his services in this matter, the sum of two dollars; and also that he pay the surrogate's fees on this proceeding, amounting to four dollars and eighty-one cents, and that he pay and distribute the balance of the said sum, amounting to two hundred and forty-six dollars and seventy-seven cents, to and among the creditors of the said deceased named in the said above mentioned decree proportionably, according to the amounts due on their respective claims, as stated and established in and by the said decree.

The whole amount of the assets of the said estate which came into the hands of the said administrator, applicable to the payment of the fees and expenses of these proceedings, and for the purpose of distribution, as established by the said above mentioned decree, was	\$833 13
To which is to be added interest included in the account this day filed,	10 26
From which is to be deducted the fees and expenses directed to be paid and allowed by the said above mentioned decree.	25 40
Referee's bill and costs as taxed in suit against H. L., as stated in account filed this day,	166 91
Fees and expenses on present proceedings,	6 81
Leaving a balance applicable to the payment of the debts of the deceased of six hundred and forty-four dollars and twenty-seven cents,	644 27
	<hr/>
	843 39 843 39

The amount paid on account of debts, as stated in the said above mentioned decree, is \$397 50, leaving the balance now distributable, as above stated,

\$246 77

It is therefore ordered, that the said administrator pay to the persons named in the first column of the following list, creditors of the said intestate, the sums set opposite their respective names in the third column of the said list, that is to say, that he pay to

C. & A. on their claim of	\$100 00	67 58
F. A. K. on his claim of	7 36	4 97
C. E. Q. on his claim of	50 15	33 88
L. P. S. on his claim of	45 87	30 99
S. H. S. on his claim of	53 75	
Whereof the said administrator has already paid the sum of \$22 50,		13 82
A. C., executrix, &c., of F. G., deceased, on her claim of	696 29	
Whereof the said administrator has already paid the sum of \$375.		95 53
		<hr/>
		\$246 77

The said sums being the amounts to which the said several creditors of the said intestate are respectively entitled on this distribution.(2)

(2) The following form of discharge to an administrator may be adopted. It may be easily applied in cases of payment, to legatees or next of kin. It is here drawn to be indorsed on a certified copy of the decree for distribution:

C. & A.,	\$67 58
F. A. K.,	4 97
C. E. Q.,	88 88

We do hereby severally acknowledge to have received from C. D., the administrator of all and singular the goods, chattels and credits of A. B., deceased, the sums above set opposite our respective names, and ordered to be paid to us respectively by the decree of which the within is a copy, and we do hereby, in consideration of the premises, and of one dollar to each of us in hand paid, release and discharge the said C. D. from all further liability and accountability as such administrator aforesaid, or for or on account of the estate of the said A. B., deceased.

In witness whereof, we have hereunto severally set our hands and seals.

Sealed in the presence of

C. & A., [SEAL.]
F. A. K., [SEAL.]
C. E. Q., [SEAL.]

ANOTHER FORM.

At, &c. (Sec No. 3.) 11th July, 1844.

<p>IN THE MATTER OF THE ESTATE OF I. R., DECEASED.</p>
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The surrogate makes and records this summary statement of the accounts of S. F., I. L. R. and P. R. K., executors of the last will and testament of I. R. aforesaid, deceased, as finally allowed and settled by him.

The debit side of the said accounts, principal,	\$179,074 42	
Income	1,250 00	
The credit:		190,324 43
To sundry bills for personal expenses, outstanding debts, expenses of collecting estate previous to Feb. 27, '44,	1,328 43	
From Feb. 27, '44, to July 10, '44, per statement,	146 60	
To legacies and interest,	2,070 75	
To commissioners of executors by law,	2,003 24	
To the following sums paid under the provisions of the will, as follows:—		
To the children of E. B. R., through the N. Y. L. I. & T. Company, their guardian,	4,574 75	
To I. D.,	23,073 95	
To E. A. & I. R. D.,	9,186 32	
To S. F., I. L. R. and P. B. R., as trustees of E. M. K.,	23,073 75	
To the same, as trustees of O. C.,	23,073 75	
To the same, as trustees of E. G.,	23,073 75	
To the same, as trustees of M. R. R.,	32,307 45	
To the same, as trustees of C. S.,	23,073 75	
To the same, as trustees of E. W.,	23,073 75	190,060 24
Leaving a balance of		\$264 18

In the same matter.—On the eighth day of July, in the same year, at the place aforesaid, at the office of the surrogate, the citation issued by the said surrogate, on the petition of S. F., I. L. R. and P. R. K., executors, being returned duly served on the N. Y. L. I. & T. Company, the guardians of the infant children E. B. R. and on I. D., and duly advertised in the New York American and Albany Argus, and the said P. R. K., one of the executors appearing in proper person, and by W. B., Esquire, his counsel and the counsel of the executors, and no other person appearing, whereupon the said surrogate proceeded to examine the said executor upon oath, and the inventory of the estate which was produced before him, and the vouchers and accounts of the said executors; and it appearing that the said executors have accounted for every part of the said estate, and that no profit has been made by them of any increase in the inventory, and the accounts of the said executors having been finally settled, and a summary statement of the same as finally settled and allowed by the surrogate having been above and herewith recorded: It is ordered that the said accounts be, and the same are finally settled and allowed as filed and adjusted by the surrogate.

In the same matter.—The accounts of S. F., I. L. R. and P. R. K., the executors of I. R. deceased, having been finally settled and allowed, by which it appears that there is in their hands undistributed the sum of two hundred and sixty-four dollars and eighteen cents: It is ordered that they pay out of this sum fifteen dollars for the costs and expenses of such accounting and of the distribution,

And that they pay the residue of said sum as follows:	
To the N. Y. L. I. & T. Co., as guardians of the children of E. B. R.	44 25
To I. D.	21 10
To the children of S. D.	51 69
To S. F., I. L. R. and P. R. K., trustees of E. M. R.	21 30
To the same, as trustees of O. C.	21 30
To the same, as trustees of E. G.	21 30
To the same, as trustees of M. R. R.	25 61
To the same, as trustees of C. S.	21 31
To the same, as trustees of E. W.	21 32

ENFORCING SURROGATE'S DECREE.

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As the respective distributive shares under said will remaining undistributed to them as legatees.

ANOTHER FORM.

At, &c. (See No. 3.) 11th November, 1845.

IN THE MATTER OF THE FINAL ACCOUNTING
OF A. B. AND M. E. W., AS ADMINISTRA-
TOR AND ADMINISTRATRIX OF THE ES-
TATE OF
I. W., DECEASED.

The surrogate makes and records this summary statement of the accounts of the adminis-
trator and administratrix, as finally settled and allowed by him and adjusted.
The whole amount of the inventory, as mentioned in said account, is \$2,710 61
The increase of said inventory is 797 19

Making the total amount of assets 3,507 80
From this there is to be deducted the following items:
Demands against the estate, as per Schedule B, \$1,731 47
Debts due the estate uncollectable, per Schedule F, 115 48
Expenses of funeral and administration, per Schedule G, 49 90 1,896 85

Leaving a balance, as settled, \$1,610 95

In the same matter.—The accounts of A. B. and M. E. W., administrator and administra-
trix, having been filed, and a summary statement of the same, as finally settled and allowed
by the surrogate, having been above and herewith recorded, it is ordered that the said ac-
counts be, and the same are, settled and allowed as filed and adjusted by the surrogate.

IN THE MATTER OF THE DISTRIBUTION OF
THE PERSONAL ESTATE OF I. W., DE-
CEASED.

The accounts of A. B. and M. E. W., the administrator and administratrix, having been
finally settled and allowed, by which it appears that there is in their hands undistributed
the sum of one thousand six hundred and ten dollars and ninety-five cents, (1,610 95:) It
is ordered that the said administrator and administratrix be allowed the sum of one hundred
and twelve dollars and sixty-seven cents for their commissions, and that they pay the sum
of seven dollars and sixty-three cents for the costs and expenses of such accounting and of
this distribution, and that they distribute the residue of the said sum as follows, to wit: To
M. E. W. the sum of four hundred and ninety-six dollars and eighty-eight cents, as widow;
the sum of three hundred and thirty-one dollars and twenty-five cents to the guardian of
F. A. W., minor; the sum of three hundred and thirty-one dollars and twenty-five cents to
the guardian of W. A. W., a minor; and the sum of three hundred and thirty-one dollars
and twenty-five cents to the guardian of B. T. W., a minor—being the sums to which they
are respectively entitled on this distribution.

No. 75. P. 547.

CERTIFICATE OF DECREE FOR PAYMENT OF MONEY.

County of New York, }
Surrogate's Court. }

IN THE MATTER OF THE ACCOUNTING OF
PHILIP THOMPSON, AS THE EXECUTOR
OF THE LAST WILL AND TESTAMENT
OF
JAMES THOMPSON, LATE OF THE CITY OF
NEW YORK, DECEASED.

I, A. W. B., surrogate of the county of New York, do hereby certify that on the
day of in the year one thousand eight hundred and fifty- a decree was

made by me in this matter in favor of William Thompson, residing in the city of Poughkeepsie, in the county of Dutchess, carpenter, a creditor of James Thompson, deceased, against Philip Thompson, residing in the city of New York, merchant, the executor of the last will and testament of the said James Thompson, directing the payment by the said Philip Thompson, executor as aforesaid, to the said William Thompson, of the sum of three hundred and twenty-four dollars and ten cents, for the debt due to the said William Thompson from the said deceased, and the sum of thirty-one dollars and twenty-five cents for his costs and expenses in this proceeding, making in the whole the sum of three hundred and fifty-five dollars and thirty-five cents.

Witness my hand and seal of office at the city of New York, this day of
[L. S.] in the year one thousand eight hundred and fifty-five.

A. W. B., *Surrogate*.

No. 76. P. 547.

ORDER TO ASSIGN ADMINISTRATOR'S BOND ON EXECUTION BEING RETURNED UNSATISFIED.

At &c. (See No. 3.)

IN THE MATTER OF THE DECREE IN FAVOR
OF L. C., AGAINST A. J., ADMINISTRATOR,
&C., OF W. B., DECEASED, FOR THE
PAYMENT OF MONEY.

A decree having heretofore been made by this court, requiring A. J., the administrator of all and singular the goods, chattels and credits of W. B., late of the city of New York, deceased, intestate, to pay to L. C. the sum of three hundred and fifteen dollars and ten cents for his claim against the estate of the said intestate, and a certificate of the said decree having been issued, and the same having been docketed with the clerk of the county of New York, pursuant to the statute in such case made and provided, as appears by a certified copy of the transcript of the said docket duly filed herein; and an execution having been duly issued thereon to the sheriff of the city and county of New York, against the said A. J.; and the said execution having been returned unsatisfied, as appears by a certified copy of the said execution, and of the return of the said sheriff, also duly filed herein, and on reading and filing the application of the said L. C., it is ordered that the bond given by the said A. J. as such administrator aforesaid, be, and the same is hereby assigned to the said L. C. for the purpose of being prosecuted.

No. 77. P. 554.

PETITION FOR AUTHORITY TO MORTGAGE, LEASE OR SELL REAL ESTATE OF DECEASED.

*County of New York, }
Surrogate's Court. }*

TO ALEXANDER W. BRADFORD, Surrogate of the County of New York.

The petition of A. L., administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, intestate, respectfully sheweth:

That the said B. M. departed this life on the thirteenth day of July, in the year 1854, and that your petitioner was duly appointed such administrator aforesaid, by the surrogate of the county of New York, on the day of in the year 1854: That he has made and filed an inventory, according to law, of the personal estate of said intestate, and that he has discovered the said personal estate to be insufficient to pay the debts of the said intestate.

Your petitioner further shows, that the amount of personal property of the said intestate which has come into his hands as such administrator, is nineteen thousand eight hundred and fifteen dollars and eighteen cents, and that the sources whence, and the manner in which the said sum has been derived, appear in the account hereto annexed, marked schedule A. That your petitioner has applied the said personal property in due course of administration, and has paid out the sum of thirteen thousand one hundred and seventeen dollars and eighty cents, and that the particulars of such application of the said personal property also appear in the said account hereto annexed, marked schedule A, leaving in the hands of your petitioner, as such administrator aforesaid, on this day of in the year 1855, the sum of six thousand six hundred and ninety-seven dollars and thirty-eight cents. And your pe-

petitioner verily believes and states the fact to be, that he has proceeded with reasonable diligence in converting the personal property of the said intestate into money, and applying the same to the payment of debts.

Your petitioner further shows that the debts outstanding against the said intestate, and the particulars thereof, as far as the same can be ascertained, appear in the schedule hereto annexed, marked schedule B. That the debts against the said intestate not secured by mortgage, or otherwise charged upon the real estate of the said intestate hereinafter described, and which remain to be paid on this day of in the year 1855, as far as the same can be ascertained by your petitioner, and as have been admitted by him upon due evidence, amount to four hundred and thirty-two thousand one hundred and fifty-four dollars and fifty-eight cents, exclusive of interest, as fully appears by the said last mentioned schedule.

Your petitioner further shows that the claims against the said intestate, mentioned in the schedule hereto annexed, marked schedule C, have been presented to your petitioner as such administrator aforesaid, but have not been admitted by him, because by the books of accounts of the said intestate, by no means so large sums appear to be due to the parties presenting such claims.

Your petitioner further shows, that the said intestate died seised of the following described real estate, valued at the sums respectively affixed to each lot or parcel, and occupied or not occupied, as stated in respect to each of the said several lots or parcels; that is to say:

All that certain house and lot of land, situate, lying and being in the Eighth ward of the city of New York, and known as, &c.

The value of this house and lot, in the judgment of your petitioner, is \$8,000.

The occupant of the same is W. G.

Also all those certain lots, pieces or parcels of ground, situate, &c.

The value of these lots, in the judgment of your petitioner, is \$800.

They are not occupied.

Your petitioner further shows, that the heirs of the said B. M., deceased, are D. M., E. M. and F. J., wife of A. J., all over the age of twenty-one years, and G. M. and H. M., minors, over fourteen years of age, having no general guardian, and J. M., a minor under fourteen years of age, also having no general guardian, all residing in the city of New York, his only children.

[*] In consideration of the premises, your petitioner, pursuant to the statute in such case made and provided, applies to the surrogate for authority to mortgage, lease or sell so much of the real estate of the said B. M., deceased, as shall be necessary to pay his debts.

And your petitioner will ever pray, &c.

Dated this day of 1855.

The usual jurat.

SCHEDULE A

Will consist of an account of the proceedings of the administrator up to the time of the presentation of the petition, showing the items and particulars of all sums received and paid out by him in the course of the administration.

SCHEDULE B

Will consist of a list of the debts owing by the deceased, showing the names of the persons to whom the same are due, and in respect to each debt, whether it is on bond, note, book account or otherwise; the date, and terms and conditions, so far as they can be ascertained of each, the sums originally payable, and the payments which may have been made, and the amount due thereon.

SCHEDULE C

Will consist of a list of the debts disputed by the administrator, and the particulars thereof.

If the administrator shall have ascertained that the requisite amount for the payment of the debts of the intestate may be raised by mortgage, a statement may be inserted in the petition at the [] similar to the following:*

Your petitioner further shows, that W. R., of the city of New York, has offered to loan a sufficient amount to pay the debts of the said intestate on a mortgage to him of the said real estate.

No. 78. P. 555.

NOTICE OF INTENTION TO APPLY FOR THE APPOINTMENT OF A SPECIAL GUARDIAN.

*County of New York, }
Surrogate's Court. }*

IN THE MATTER OF THE APPLICATION OF
A. L., THE ADMINISTRATOR, &c., OF B.
M., DECEASED, INTESTATE, FOR AUTHORITY
TO MORTGAGE, LEASE OR SELL THE
REAL ESTATE OF THE SAID INTESTATE,
FOR THE PAYMENT OF HIS DEBTS.

Take notice, that I have presented an application to the surrogate of the county of New York, pursuant to the statute in such case made and provided, for authority to mortgage, lease or sell the real estate of B. M., late of the city of New York, deceased, intestate, for the payment of his debts, and that I intend to apply to the said surrogate, at his office in the city of New York, on the day of instant, at ten o'clock in the forenoon, for the appointment of a guardian for each of you, the minor heirs of the said intestate, for the sole purpose of appearing for you, and taking care of your interests in the proceedings on the said application.

Dated this day of 1855.

Yours, &c., A. L., Administrator, &c.
of B. M., deceased.

To G. M. }
H. M. } Minors, heirs of B. M. deceased.
J. M. }

No. 79. P. 556.

ORDER APPOINTING SPECIAL GUARDIAN.

(At, &c. (See No. 3.))

IN THE MATTER OF THE APPLICATION OF
A. L., THE ADMINISTRATOR, &c., OF B.
M., DECEASED, INTESTATE, FOR AUTHORITY
TO MORTGAGE, LEASE OR SELL THE
REAL ESTATE OF THE SAID INTESTATE
FOR THE PAYMENT OF HIS DEBTS.

A. L., the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, intestate, having heretofore presented his application to the surrogate, pursuant to the statute in such case made and provided, for authority to mortgage, lease or sell the real estate of the said intestate for the payment of his debts; and on reading and filing due proof, by affidavit, of the service of a notice of the intention of the said administrator to apply on this day for the appointment of a special guardian for G. M. and H. M., minors over fourteen years of age, and J. M., a minor under fourteen years of age, on the said G. M. and H. M. personally, and on S. M., the mother of the said J. M., in whose custody the said minor now is, and with whom he lives; and no one appearing to oppose, it is ordered that W. C. F. a disinterested freeholder, residing in the city of New York, be, and he is hereby appointed the guardian of the said G. M., H. M. and J. M., minors aforesaid, for the sole purpose of appearing for them, and taking care of their interest in the proceedings on the said application.

No. 80. P. 557.

ORDER TO SHOW CAUSE.

Title. (See No. 79.)

At, &c. (See No. 3.)

On reading and filing the application of A. L., the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, intestate, for

ORDER TO MORTGAGE.

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authority to mortgage, lease or sell the real estate of the said intestate for the payment of his debts, it is ordered that all persons interested in the estate of the said B. M., deceased, appear before the surrogate of the county of New York, at his office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day, then and there to show cause why authority should not be given to the said administrator to mortgage, lease or sell so much of the real estate of the said B. M., deceased, as shall be necessary to pay his debts.

No. 81. P. 563.

ENTRY OF DEMANDS AGAINST THE DECEASED IN THE SURROGATE'S MINUTES.

At, &c. (See No. 3.)

IN THE MATTER OF THE APPLICATION TO
MORTGAGE, LEASE OR SELL THE REAL
ESTATE
OF
R. S., DECEASED.

On hearing, at the time and place appointed in the order to show cause, entered in this matter on the fourth day of April, 1854, and at the times and places to which such hearing was adjourned, the said surrogate adjudged the demands of the following persons to be valid and subsisting demands against the said testator, R. S., deceased, that is to say: The demand of

	Time due.	Amounts paid.	When paid.
W. T.	\$2,400 00, 1st January, 1852,	\$402 99 } 290 00 }	October 7th, 1853. November 5th, 1854.
W. A.,	300 00, 9th September, 1851,	120 00 } 40 50 }	October 7th, 1853. March 4th, 1854.

No. 82. P. 567.

BOND ON ORDER TO MORTGAGE.

Know all men by these presents, that we, A. L., of the city of New York, the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, intestate, and J. R., of the same city, merchant, and N. P., of the same city, gentleman, are held and firmly bound unto the People of the State of New York, in the sum of dollars, lawful money of the United States of America, to be paid to the said people; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated this day of in the year one thousand eight hundred and fifty-

Whereas the above bounden A. L., administrator as aforesaid, has lately made application to the surrogate of the county of New York for authority to mortgage, lease or sell so much of the real estate of the said B. M., deceased, as shall be necessary to pay his debts: and whereas such proceedings, in due form of law, have been thereupon had, that the said surrogate is about to [*] direct a mortgage of the real estate of the said deceased to be made, for the purpose of raising moneys for the payment of the said debts:

Now the condition of this obligation is such, that if the said A. L. shall faithfully apply the moneys arising from the said mortgage to the payment of the debts against the said deceased, established before the said surrogate, on granting the order for such mortgage, and shall account for such moneys whenever required by the said surrogate, or by any court of competent authority, then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered, &c.

(Signed)

[SEAL]

No. 83. P. 564.

ORDER TO MORTGAGE.

Title. (See No. 79.)

At, &c. (See No. 3.)

A. L., the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, intestate, having heretofore presented to the surrogate of

REPORT OF SALE.

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the people of this state, with sufficient sureties approved by the said surrogate, in the penalty and with the condition prescribed by the statute in such case made and provided, which said bond is filed with the said surrogate, it is thereupon ordered, and the surrogate aforesaid, pursuant to the statute aforesaid, doth order that the said A. L., administrator as aforesaid, sell the following described real estate, whereof the said intestate died seised, to enable him to pay such debts aforesaid of the said intestate, that is to say:

All that certain house and lot of land, situate, lying and being in the Eighth ward of the city of New York, known as, &c.

Also, all those certain lots, pieces or parcels of ground, situate, &c.

And it is further ordered and directed that the said administrator may give to the purchaser at such sale of any of the said real estate, a credit not exceeding two years, for not more than one-half of the purchase money of such real estate purchased by him, to be secured by a bond of the said purchaser, and by a mortgage of the premises to him sold at the said sale.

And it is further ordered that the said administrator do make return, according to law, of all sales made by virtue of this order.

In testimony whereof, the surrogate, &c.

No. 86. P. 569.

REPORT OF SALE.

Surrogate's Court—County of New York.

IN THE MATTER OF THE ADMINISTRATOR'S
SALE OF THE REAL ESTATE OF B. M.,
DECEASED, INTESTATE, FOR THE PAY-
MENT OF HIS DEBTS.

To ALEXANDER W. BRADFORD, Surrogate of the County of New York:

The return of A. L., the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, intestate, of his proceedings under the order of sale of the real estate of the said intestate granted by the surrogate, and bearing date on the day of in the year one thousand eight hundred and fifty—

The said administrator doth report and return that he caused a notice that the said real estate would be sold at public vendue, at the Merchant's Exchange, in the city of New York, on the day of instant, at twelve o'clock at noon of that day, to be posted for six weeks previous to the day appointed for the said sale, at the Bank of the Republic, on the northeast corner of Broadway and Wall street, at and at three of the most public places in the First ward of the

city of New York, in which said ward the said Merchants' Exchange is situated, and the same notice to be published for six weeks successively, previous to the day appointed for the said sale, in the newspaper entitled the Morning Courier and the New York Enquirer, printed in the county of New York, a copy of which said notice, with the proof of such posting and publication thereof, is hereunto annexed.

And the said administrator further reports and returns, that on the said day of instant, between the hour of nine o'clock in the morning and the setting of the sun of the same day, at the Merchants' Exchange, in the city of New York, and within the county of New York, wherein the premises ordered to be sold are situated, be sold at public vendue, the whole of the real estate mentioned and described in the said order of sale, and that he did, on the said sale, sell the premises described in the said order as follows:—

All that certain house and lot of land, situate, lying and being in the Eighth ward, &c.;

To H. B., for the sum of six thousand dollars, that being the highest sum bid for the same, \$6,000

And that on the said sale, he did further sell the premises described in the said order as follows:—

All those certain lots, pieces or parcels of ground, &c.;

To I. I. A., for the sum of three thousand dollars, that being the highest sum bid for the same, \$3,000

And that on the said sale, he did further sell, &c.;

And the said administrator doth further report and return to the surrogate that the said sale was in all respects legally made and fairly conducted.

All which is respectfully submitted.

Dated this day of A. D. 185 .

A. L., Administrator, &c.

No. 87. P. 570.

ORDER CONFIRMING SALE.

At, &c. (See No. 3.)

IN THE MATTER OF THE SALE OF THE REAL
ESTATE OF B. M., DECEASED FOR THE PAY-
MENT OF HIS DEBTS.

An order having been duly made by the surrogate of the county of New York, on the day of in the year one thousand eight hundred and fifty- authorizing A. L., the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, intestate, to sell the real estate whereof the said intestate died seised, mentioned and described in the said order, to enable him to pay the debts therein mentioned of the said intestate, and the said administrator having this day made his return of his proceedings upon the said order, by which said return it appears that under the said order, the said administrator, after having posted and published due notice of the time and place of holding the said sale according to law, did, on the day of in the year one thousand eight hundred and fifty- at twelve o'clock at noon, the time mentioned in the said notice, and between the hour of nine in the morning and the setting of the sun of the same day, at the Merchants' Exchange, in the city of New York, the place mentioned in the said notice, sell at public vendue, the whole of the premises mentioned and described in the said order, and that he did, on the said sale, sell the premises described in the said order as follows:

All that certain house and lot of land, situate, lying and being in the Eighth ward of the city of New York, and known as, &c.;

To H. B., for the sum of six thousand dollars, that being the highest sum bid for the same, \$6,000

And that on the said sale, he did further sell the premises described in the said order as follows:

All those certain lots, pieces or parcels of ground, &c.

To I. J. A., for the sum of three thousand dollars, that being the highest sum bid for the same, \$3,000

And the said administrator having this day appeared before the surrogate, in his own proper person, and by T. L. W., his counsel, and having moved for an order confirming the said sale, and G. M., one of the heirs of the said intestate having also appeared in his own proper person, and by G. B., his counsel, and having made opposition to the confirmation of the said sale, and the surrogate having examined the proceedings upon the aforesaid order of sale, and having examined the said administrator and several other persons on oath touching the same; and it appearing to the surrogate that the said sale was legally made and fairly conducted, and that the sums bid for the several lots and parcels of the real estate so sold were not disproportionate to their value respectively: It is ordered and decreed, and the surrogate, pursuant to the provisions of the statutes concerning the powers and duties of executors and administrators in relation to the sale and disposition of the real estate of their testator or intestate, doth order and decree, that the said sale of the said real estate, so as aforesaid made by the said administrator, be, and the same hereby is confirmed. And the said surrogate, pursuant to the provisions of the statutes aforesaid, doth further order and direct the said A. L., administrator as aforesaid, to execute conveyances of the said several lots and parcels of the said real estate so sold by him as aforesaid, to the purchasers thereof respectively at the said sale.

In testimony whereof, the surrogate, &c.

No. 88. P. 570.

ADMINISTRATOR'S DEED.

This indenture, made the day of one thousand eight hundred and fifty- between A. L., administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, of the first part, and G. E. B., of the city of New York, gentleman, of the second part, witnesseth:

Whereas A. W. B., Esquire, surrogate of the county of New York, heretofore made an order, which said order is in the words and figures following, to wit: [*Here take in order for sale.*] And whereas, the whole of the premises described in the said order, have accordingly been sold at public vendue, by the said party of the first part, on the

day of _____, 185 , at the Merchants' Exchange, in the county of New York, that being the county where the said premises are situated, due notice of the time and place of holding such sale having been given according to law: And whereas, the said party of the first part did make return of his proceedings upon such order of sale to the said surrogate, in pursuance of the said order, and of the statute in such case made and provided: And whereas, afterwards, the said surrogate, after examining the said proceedings, did make an order in the words and figures following, to wit: [*Here take in the order for confirmation.*]

And whereas, the said party of the first part did at the said sale sell to the said party of the second part, he being the highest bidder for the same,

Now this indenture further witnesseth: That the said party of the first part, in pursuance of the said sale, and of the said orders of the said surrogate, and in pursuance of the statutes of this state in such case made and provided, and, also, for and in consideration of the sum of _____ dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained, sold and conveyed, and by these presents doth bargain, sell and convey unto the said party of the second part, his heirs and assigns for ever, ALL that certain, &c.

Together with the privileges and appurtenances thereunto belonging, or in any way appertaining, and all the estate, right and interest which the said B. M., deceased, at the time of his death, had of, in and to the same, free and discharged from all claims for dower of R. M., widow of the said B. M., deceased; subject, however, to all charges by judgment, mortgage or otherwise, upon the lands so sold, existing at the time of the death of the said B. M.

To have and to hold the above described and conveyed premises, with the appurtenances, and all the estate, right and interest which the said B. M., at the time of his death had therein, unto the said party of the second part, his heirs and assigns forever, as fully and amply as the said party of the first part might, could or ought to sell and convey the same, by virtue of the orders above recited, and of the statutes of this state made and provided, or otherwise. In witness whereof the said party of the first part has hereunto set hand and seal, the day and year first above written.

Sealed and delivered in presence of

No. 89. P. 572.

NOTICE TO WIDOW AS TO SATISFACTION OF HER DOWER.

Surrogate's Court, County of New York.

IN THE MATTER OF THE DISTRIBUTION OF
THE PROCEEDS OF THE SALE OF THE REAL
ESTATE OF B. M., DECEASED.

Take notice, that A. L., the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, intestate, has brought into the office of the surrogate of the county of New York, the moneys arising from the sale lately made by him of the real estate of the said intestate, pursuant to an order authorizing such sale heretofore granted by the said surrogate, and that the said surrogate will satisfy your claim of dower upon the lands so sold, by the payment to you of such sum in gross as shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction for your said claim, if you shall consent before or on the _____ day of _____ instant, at ten o'clock in the forenoon, to accept such sum in lieu of your said dower, by an instrument under seal, duly acknowledged or proved in the same manner as deeds entitled to be recorded: And that if such consent be not given within the time above mentioned, then the said surrogate will set apart one-third of the purchase money of the said real estate to satisfy your said claim of dower, and will cause the same to be invested according to law.

Dated this _____ day of _____ A. D. 185 _____

Yours, &c.

To R. M., the widow of B. M., deceased, intestate.

APPENDIX.

No. 90. P. 573.

ANNUITY TABLE.

A table, corresponding with the Northampton tables, referred to at page 573, and in the 75th rule of the Supreme Court, showing the value of an annuity of one dollar, at six per cent., on a single life, at any age from one year to ninety-four, inclusive.

Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.	Age.	Number of years' purchase the annuity is worth.
1	10,107	25	12,063	49	9,563	73	4,781
2	11,724	26	11,992	50	9,417	74	4,565
3	12,348	27	11,917	51	9,273	75	4,354
4	12,769	28	11,841	52	9,129	76	4,154
5	12,962	29	11,763	53	8,980	77	3,952
6	13,156	30	11,682	54	8,827	78	3,742
7	13,275	31	11,598	55	8,670	79	3,514
8	13,337	32	11,512	56	8,509	80	3,281
9	13,335	33	11,423	57	8,343	81	3,155
10	13,285	34	11,331	58	8,173	82	2,926
11	13,212	35	11,236	59	7,999	83	2,713
12	13,130	36	11,137	60	7,820	84	2,551
13	13,044	37	11,035	61	7,637	85	2,402
14	12,953	38	10,929	62	7,449	86	2,266
15	12,857	39	10,819	63	7,253	87	2,138
16	12,755	40	10,705	64	7,052	88	2,031
17	12,655	41	10,589	65	6,841	89	1,882
18	12,562	42	10,473	66	6,625	90	1,689
19	12,477	43	10,356	67	6,405	91	1,422
20	12,398	44	10,235	68	6,179	92	1,136
21	12,329	45	10,110	69	5,949	93	0,806
22	12,265	46	9,980	70	5,716	94	0,518
23	12,200	47	9,846	71	5,479		
24	12,132	48	9,707	72	5,241		

RULE FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest, at six per cent., for one year, upon the sum to the income of which the person is entitled; multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person in said sum.

EXAMPLE.

Suppose a widow's age is 37, and she is entitled to dower in real estate worth \$350 75: one-third of this is \$116 91 2-3; interest on \$116 91, one year, at six per cent., is \$7 01; the number of years' purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years and 035.1000 parts of a year, which, multiplied by \$7 01, the income for one year, gives \$77 35 and a fraction, as the gross value of her right of dower.

No. 91. P. 573.

WIDOW'S RELEASE OF DOWER, AND CONSENT TO ACCEPT A SUM IN GROSS.

Whereas A. L., the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, my late husband, has recently sold the real estate whereof the said B. M. died seised, upon an order of the surrogate of the county of New

DISTRIBUTION OF PROCEEDS.

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York, authorizing him to sell the same for the payment of the debts of the said deceased, and has brought the moneys arising from such sale into the office of the said surrogate for the purpose of distribution: Now these presents witness, that I, R. M., of the city of New York, widow of the said B. M., deceased, do hereby consent to accept such sum in gross, as shall be deemed, upon the principles of law, applicable to annuities, a reasonable satisfaction for my claim of dower upon the lands so sold as aforesaid in lieu of my dower therein.

And these presents further witness, that I, the said R. M., widow as aforesaid, do hereby acknowledge that I have received from A. W. B., Esquire, surrogate of the county of New York, the sum of dollars and cents, pursuant to the foregoing consent, in full discharge and satisfaction of all my right and claim of dower upon the lands so sold as aforesaid.

In testimony whereof, I have hereunto set my hand and seal this day of in the year one thousand eight hundred and fifty-

Sealed and delivered, &c.

R. M., [SEAL.]

No. 92. P. 573.

ORDER FOR PUBLICATION OF NOTICE OF DISTRIBUTION.

At, &c. (See No. 3.)

IN THE MATTER OF THE DISTRIBUTION
OF THE PROCEEDS OF THE SALE OF
THE REAL ESTATE OF B. M., DE-
CEASED.

A, L., the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, intestate, having brought into the office of the surrogate the moneys arising from the sale of the real estate of the said intestate, lately made by him upon the order of the surrogate, and the proceeds of the said sale, after making the necessary deductions therefrom, not being sufficient to pay all the debts of the said intestate, it is thereupon ordered, that the balance of such proceeds be divided among the creditors according to law, at the surrogate's office in the city of New York, on the day of next, and that notice of the time and place of making such distribution be published for six weeks successively, in the newspaper entitled "the Evening Post," printed in the county of New York, and also in the newspaper entitled "the Albany Argus," the said last named newspaper being deemed, by the surrogate, most likely to give notice to the creditors.

NOTICE OF DISTRIBUTION.

Notice is hereby given, that the balance remaining of the proceeds of the sale of the real estate of B. M., late of the city of New York, deceased, intestate, lately made under the order of the surrogate of the county of New York, by A. L., the administrator of all and singular the goods, chattels and credits of the said intestate, will be divided by the said surrogate among the creditors of the said intestate, in proportion to their respective debts, according to law, at the surrogate's office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day.

Dated this day of A. D. 1855

No. 93. P. 574.

ENTRY OF DISTRIBUTION IN THE SURROGATE'S MINUTES.

At, &c. (See No. 3.)

IN THE MATTER OF THE ESTATE
OF
R. S., DECEASED.

On the hearing for distribution, in pursuance of notice, on the day of 1855, and at the times and places to which such hearing was adjourned, and on the hearing on the order of sale, the following demands of the following named persons have been and were es-

tablished as valid subsisting demands against the said intestate, R. S., deceased, and are the only demands established: That said persons' names are mentioned in the first column of the following list, and the amount due to each in the second column opposite each name, and the amount to which each person is entitled on this distribution, this day ordered, in the third column opposite each name, which list is as follows, that is to say,

Names.	Amount due.	Amount entitled.
W. T.,.....	\$1,281 73	\$726 73
W. A.,.....	192 11	108 92
&c.		&c.

At, &c. (See No. 3.)

IN THE MATTER OF THE DISTRIBUTION OF THE ESTATE OF R. S. DECEASED.

Notice that distribution of the proceeds of the sale of the real estate in this matter, would be made on the day of 185 having been duly published, and the whole amount of the money paid into the office of the said surrogate, on the sale of the said real estate, being \$4,132 59, from which is to be deducted the costs and charges of the said surrogate in this matter, to wit, the sum of \$62 23, for his fees and costs, and \$7 40, for advertising notice of distribution in this matter in the New York Daily Tribune, leaving in the hands of the said surrogate, undistributed, the sum of \$4,062 96, and E. S., the widow of the testator, being entitled to dower in the lands sold, and she having consented to take a gross sum in lieu of said dower, it is ordered that distribution be made of said sum as follows, that is to say, to the said widow the sum of \$777 08, being the gross sum to which she is entitled in lieu of said dower, and that the residue of said sum be distributed among the creditors of the testator, whose debts have been established and above recorded, in the proportion as set opposite their respective names in the third column above recorded, that is to say, each to receive the amount set opposite their respective names in said third column, as the share of each on this distribution.

No. 94. P. 579.

PETITION OF A CREDITOR TO REQUIRE AN ADMINISTRATOR TO MORTGAGE, LEASE OR SELL THE REAL ESTATE OF THE DECEASED, FOR THE PAYMENT OF HIS DEBTS.

*County of New York, }
Surrogate's Court. }*

TO ALEXANDER W. BRADFORD, Surrogate of the County of New York:

The petition of C. R., of the city of New York, merchant, respectfully sheweth, that he is a creditor of D. S., late of the city of New York, deceased, intestate: That the said intestate died indebted to your petitioner in the sum of dollars and interest upon a promissory note made by him to your petitioner or order, dated the day of 185 and payable in ninety days after date: That the said claim is justly due to your petitioner; that no payments have been made thereon, and that there are no off-sets against the same to the knowledge of your petitioner, and that the same is not secured by judgment or mortgage upon or expressly charged on the real estate of the said deceased.

Your petitioner further shows, that letters of administration of all and singular the goods, chattels and credits of the said D. S., deceased, were duly granted by the surrogate of the county of New York, to E. T., on the day of in the year 185 and that the same still remain in full force, as he is informed and believes: That your petitioner has presented his said claim to the said administrator, and that the same has been admitted by him to be a valid and subsisting claim against the said intestate.

Your petitioner further shows, that on the day of last past, the said E. T. rendered to the surrogate an account of his proceedings as such administrator aforesaid, and which said account has been settled before the said surrogate, and that it appears from the said account, upon such settlement, that there are not sufficient assets to pay the debts of the said deceased.

Your petitioner further shows, that the said intestate died seised of the following described real estate, valued at the sums respectively affixed to each lot or parcel, and occupied or not occupied, as stated in respect to each of the said several lots or parcels; that is to say:

ORDER THAT ADMINISTRATOR SHOW CAUSE.

lxxi

All that certain house and lot of land, situate, lying and being in the Eighth ward of the city of New York, and known as, &c.

The value of this house and lot, in the judgment of your petitioner, is \$8,000.

The occupant of the same is W. G.

Also, all those certain lots, pieces or parcels of ground, situate, &c.

The value of these lots, in the judgment of your petitioner, is \$800.

They are not occupied.

Your petitioner further shows, that the heirs of the said D. S., deceased, are L. S., M. S. and N. S., all of full age, and all residing in the city of New York, his only children.

Your petitioner further shows, that he is desirous that the said real estate of the said intestate, or so much thereof as shall be necessary for that purpose, should be mortgaged, leased or sold for the payment of his debts. He therefore prays that the surrogate will grant an order for the said E. T., administrator as aforesaid, to show cause why he should not be required to mortgage, lease or sell the real estate of the said deceased, for the payment of his debts, and that such further proceedings, according to law, may be thereupon had as may tend to the relief of your petitioner, and to the satisfaction of his claim aforesaid out of the said real estate of the said intestate.

And your petitioner will ever pray, &c.

Dated this day of A. D. 185 .

The usual jurat.

No. 95. P. 580.

ORDER THAT ADMINISTRATOR SHOW CAUSE.

At, &c. (See No. 3.)

IN THE MATTER OF THE APPLICATION OF
C. R., A CREDITOR OF D. S., DECEASED,
TO HAVE THE REAL ESTATE OF THE
SAID DECEASED MORTGAGED, LEASED
OR SOLD FOR THE PAYMENT OF HIS
DEBTS.

On reading and filing the petition of C. R., of the city of New York, merchant, a creditor of D. S., late of the said city, deceased, intestate, it is ordered, pursuant to the prayer of the said petition, that E. T., the administrator of all and singular the goods, chattels and credits of the said D. S., deceased, personally be and appear before the surrogate of the county of New York, at his office in the city of New York, on the day of instant, at ten o'clock in the forenoon of that day, then and there to show cause why he should not be required to mortgage, lease or sell the real estate of the said D. S., deceased, for the payment of his debts.

No. 96. P. 580.

ORDER THAT PERSONS INTERESTED SHOW CAUSE.

Title. (See No. 95.)

At, &c. (See No. 3.)

An order having heretofore been duly made on the application of C. R., of the city of New York, merchant, a creditor of D. S., late of the said city, deceased, intestate, requiring E. T., the administrator of all and singular the goods, chattels and credits of the said intestate, personally to be and appear before the surrogate of the county of New York, on this day, to show cause why he should not be required to mortgage, lease or sell the real estate of the said deceased for the payment of his debts, and the said administrator having appeared, and having shown no cause to the contrary, it is ordered that all persons interested in the estate of the said D. S., deceased, intestate, appear before the surrogate of the county of New York, at his office in the city of New York, on the day of next, at ten o'clock in the forenoon of that day, then and there to show cause why authority should not be given to the said administrator to mortgage, lease or sell so much of the real estate of the said D. S., deceased, as shall be necessary to pay his debts.

No. 97. P. 581.

ORDER FOR SALE GRANTED ON THE APPLICATION OF A CREDITOR.

*Title. (See No. 95.)**At, &c. (See No. 3.)*

An order having heretofore been duly made by the surrogate of the county of New York, on the application of C. R., of the city of New York, merchant, a creditor of D. S., late of the said city, deceased, intestate, requiring E. T., the administrator of all and singular the goods, chattels and credits of the said intestate, personally to be and appear before the surrogate of the county of New York, on the day of last past, to show cause why he should not be required to mortgage, lease or sell the real estate of the said D. S., deceased, for the payment of his debts, and the said administrator having appeared, and having shown no cause to the contrary; and, thereupon, the said surrogate having made a further order, directing all persons interested in the estate of the said D. S., deceased, to appear before him, at the surrogate's office in the city of New York, on this day, at ten o'clock in the forenoon, to show cause why authority should not be given to the said administrator to mortgage, lease or sell so much of the real estate of the said D. S., deceased, as shall be necessary to pay his debts, and on reading and filing satisfactory proof, by affidavit, of the due publication of the said order, and of the due service thereof on every person in the occupation of the premises of which a sale is desired, and on the widow and heirs of the said deceased, and the said administrator having this day appeared in person and by D. W., his proctor; and L. S., one of the heirs of the real estate in question, and the said C. R. having also appeared; and the proper proceedings in due form of law having been thereupon had, and the surrogate, upon due examination, being satisfied that the said administrator has fully complied with the requisite provisions of the statutes concerning the powers and duties of executors and administrators in relation to the sale and disposition of the real estate of their testator or intestate, that the debt of the said C. R., and other debts presented and proved before the said surrogate, and which the said surrogate has duly adjudged valid and subsisting against the estate of the said deceased, and for the purpose of satisfying which, application for the mortgage, lease or sale of the real estate of the said deceased is made, are justly due and owing, and that they are not secured by judgment or mortgage upon or expressly charged on the real estate of the said deceased, and that the same amount to dollars and cents, exclusive of interest, and that the personal estate of the said deceased is insufficient for the payment of such debts; and having satisfactory evidence that the said administrator has proceeded with reasonable diligence in converting the personal property of the said deceased into money, and applying the same to the payment of debts; and having inquired and ascertained whether sufficient moneys for the payment of such debts aforesaid can be raised by mortgaging or leasing the property of the said deceased, or any part thereof; and it appearing that the moneys required cannot be raised by mortgage or lease advantageously to the estate of the said deceased, and the said E. T., administrator as aforesaid, having executed a bond to the people of this state, with sufficient sureties, approved by the said surrogate, in the penalty and with the condition prescribed by the statute in such case made and provided, which said bond is filed with the said surrogate, it is thereupon ordered, and the surrogate aforesaid, pursuant to the statutes aforesaid, doth order that the said E. T., administrator as aforesaid, sell the following described real estate whereof the said intestate died seised, to enable him to pay such debts aforesaid of the said intestate, that is to say,

All that certain house and lot of land, &c.

Also, all those certain lots, pieces or parcels of ground, situate, &c.

And it is further ordered and directed that the said administrator may give to the purchaser at such sale, of any of the said real estate, a credit not exceeding two years, for not more than one-half of the purchase money of such real estate purchased by him, to be secured by a bond of the said purchaser, and by a mortgage of the premises to him sold at the said sale.

And it is further ordered that the said administrator do make return, according to law, of all sales made by virtue of this order.

In testimony whereof, the surrogate, &c.

ALLEGATIONS AGAINST A WILL.

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No. 98. P. 594.

ALLEGATIONS AGAINST A WILL.

County of New York, }
Surrogate's Court. }

To A. W. B., Surrogate of the County of New York:

The allegations of Henry Thompson, one of the next of kin to James Thompson, late of the city of New York, deceased, against the validity of the last will and testament of the said James Thompson, deceased, and against the competency of the proof thereof.

First allegation. That the said James Thompson, at the time of the execution of the instrument in writing, purporting to be his last will and testament, was not competent to make a will.

Second allegation. That the instrument in writing aforesaid was not executed and attested in the manner prescribed by law for the execution and attestation of last wills and testaments.

Third allegation. That the execution of the said instrument, by the said James Thompson, was obtained by fraud, imposition and coercion practiced upon the said James Thompson, by certain legatees and devisees named in the said instrument, or by some person or persons at their instance, and under and by their direction and contrivance; and that the said James Thompson, at the time of the execution of the said instrument, was under the influence, duress and restraint of the said legatees and devisees.

Fourth allegation. That the testimony of the attesting witnesses to the said instrument was vague, indefinite and uncertain, and did not prove the due execution and attestation of the said instrument in the mode prescribed by law.

Dated this day of A. D. 185 .

HENRY THOMPSON.

R. P., Proctor and of Counsel for Henry Thompson.

ALLEGATIONS IN THE FOLLOWING FORM WERE FILED IN THE NEW YORK SURROGATE'S OFFICE, IN AN IMPORTANT CASE, UNDER THE DIRECTION OF EMINENT COUNSEL.

In the Surrogate's Court for the County of New York.

IN THE MATTER OF THE PROBATE OF A PA-
PER WRITING PURPORTING TO BE THE
LAST WILL AND TESTAMENT

OF

J. M., DECEASED, BEARING DATE THE TWENTY-
SIXTH DAY OF SEPTEMBER, ONE THOU-
SAND EIGHT HUNDRED AND THIRTY-NINE.

A paper writing, bearing date the twenty-sixth day of September, in the year one thousand eight hundred and thirty-nine, purporting to be the last will and testament of J. M., deceased, in and by which I. J., G. J. and A. G. H. are appointed executors thereof, and M. J. and R. J. are appointed executrices thereof, having been heretofore propounded before James Campbell, Esquire, then surrogate of the city and county of New York, as such last will and testament; and having been by the said James Campbell, as such surrogate, at a Surrogate's Court held in and for the said county, on the twenty-first day of October now last past, admitted to probate; and the undersigned, H. A., wife of the undersigned, J. A., being the daughter of said J. M., deceased, and one of his next of kin, we, the undersigned J. A. and H. his wife, pursuant to the statute in such case made and provided, do hereby contest the said probate and the validity of the said paper-writing, so purporting to be such last will and testament; and for that purpose allege against the validity of such alleged will, and against the competency of the proof thereof:

First. They, the subscribers, allege that the said paper-writing is not the last will and testament of the said J. M., deceased.

Secondly. They allege that the said J. M., deceased, was not, at the time of the making and subscribing, or of the acknowledging by him, the said J. M., of the said paper-writing, purporting to be his last will and testament, of sound mind or memory, or in any respect capable of making a will.

Thirdly. They allege that the said J. M., deceased, did not, at the time of making the subscription at the end of said alleged will, or at the time of acknowledging the same subscription to have been made by him to the attesting witnesses to the said paper-

writing, declare the said paper-writing to be the last will and testament of him, the said J. M.

Fourthly. They allege that the attesting witnesses to said alleged will did not, nor did either of them sign his name as a witness at the end of said alleged will, at the request of the said J. M.

Fifthly. They allege that the said paper-writing, purporting to be such last will and testament, was obtained, and the execution thereof by said J. M., procured by fraud and circumvention, and undue influence practiced against and upon the said J. M., by R. J., M. J., I. J. and G. J., or some or one or them, or some other person or persons unknown to the subscribers.

Sixthly. They allege that the said paper-writing was not freely and voluntarily executed or made as his last will and testament, by said J. M., deceased, but that the subscription thereto and publication thereof by him, the said J. M., was procured by fraud and coercion exercised upon him, the said J. M., deceased, by the said R., M., I. and G., or some one of them, or some other person or persons to the subscribers unknown.

Seventhly. They allege that the said paper-writing was not duly and sufficiently proved before the said James Campbell, as such surrogate, when so admitted to probate as aforesaid, and that the proofs taken at the said Surrogate's Court, on such admission thereof to probate, did not and do not show or establish that the said J. M., deceased, was of sound mind or memory when the same alleged will was made, or that he was free from restraint when he made the same, or that the same alleged will was subscribed by the said J. M., or declared by him to be his last will and testament, in the manner required by the statute in that behalf, or that the same was duly attested, as required by said statute.

City and County of New York, ss.—J. A., one of the subscribers to the foregoing allegations, being duly sworn, saith, that he has good reason, from circumstances, to believe, and that he does verily believe, the matters stated and alleged in the preceding document to be true, and that the same document was subscribed by him, this deponent, and his wife E. who is one of the next of kin of the above named J. M., deceased.

J. A.

Sworn this 20th day of October, 1840, }
before me, }

W. H. B., *Commissioner of Deeds.*

No. 99. P. 594.

ORDER FOR ISSUING CITATION ON ALLEGATIONS.

At, &c. (See No. 3.)

IN THE MATTER OF THE ALLEGATIONS AGAINST
THE PROBATE OF THE WILL
OF
JAMES THOMPSON, DECEASED.

On reading and filing the allegations of Henry Thompson, one of the next of kin to James Thompson, late of the city of New York, deceased, against the validity of the last will and testament of the said James Thompson, deceased, and the competency of the proof thereof, and on motion of Mr. R. P., of counsel for the said Henry Thompson, it is ordered that a citation issue to Philip Thompson, the executor, who has taken upon himself the execution of the said last will and testament, and to Cornelia Thompson, William Thompson, Charles Thompson, and the Orphan Asylum Society of the city of New York, legatees named in the said last will and testament, residing in the state of New York, requiring them, and each of them, to appear in this court on the first day of September next, at ten o'clock in the forenoon of that day, to show cause why the probate of the said last will and testament should not be revoked.

CITATION ON ALLEGATIONS.

The People of the State of New York, to Philip Thompson, one of the executors who has taken upon himself the execution of the last will and testament of James Thompson, late of the city of New York, deceased, and to Cornelia Thompson, William Thompson, Charles Thompson, and the Orphan Asylum Society of the city of New York, legatees named in the said last will and testament, residing in the state of New York, send greeting:

ORDER REVOKING PROBATE.

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You and each of you, are hereby cited and required to appear before the surrogate of the county of New York, at his office in the city of New York, on the first day of September next, at ten o'clock in the forenoon of that day, to show cause why the probate of the said last will and testament of James Thompson, deceased, should not be revoked.

In testimony whereof, we have caused, &c.

(The forms for the examination of witnesses are similar to those on proving wills. See Appendix, p. .)

No. 100. P. 595.

ORDER REVOKING PROBATE.

At, &c. (See No. 3.)

IN THE MATTER OF THE ALLEGATIONS OF HENRY THOMPSON, AGAINST THE VALIDITY OF THE WILL OF JAMES THOMPSON, DECEASED, AND THE COMPETENCY OF THE PROOF THEREOF.

This matter having come on to be heard on the allegations of Henry Thompson, one of the next of kin to James Thompson, late of the city of New York, deceased, against the validity of the last will and testament of the said James Thompson, deceased, and against the competency of the proof thereof, and on the return of the citation heretofore issued therein, requiring Philip Thompson, the executor who has taken upon himself the execution of the said last will and testament, and Cornelia Thompson, William Thompson, Charles Thompson and the Orphan Asylum Society of the city of New York, legatees named in the said last will and testament, residing in the state of New York, to appear in this court on the day of last past, to show cause why the probate of the said last will and testament of James Thompson, deceased, should not be revoked, and due proof of the personal service of the said citation on all the persons and parties named therein having been produced and filed, and Henry Thompson, one of the next of kin of the said James Thompson, deceased, and who filed the allegations herein, having appeared by R. P., their proctor and counsel, in support of the said allegations, and the said Philip Thompson, the executor as aforesaid, and the said William Thompson, having appeared by C. C., his proctor and counsel, in opposition thereto, and the said, the Orphan Asylum Society of the city of New York, having appeared by A. D., their proctor and counsel, also in opposition thereto, and I. H., the special guardian of Charles Thompson, one of the said legatees, a minor, having duly appeared in behalf of the said minor, and no other person or party having appeared in the said matter, and the said matter having been heard on several days, and duly adjourned to this day, and upon hearing the proofs of the parties aforesaid, and counsel for them respectively, and due deliberation being thereupon had, it is adjudged, decided and decreed, and the surrogate of the county of New York, by virtue of the power and authority in him vested, [*] doth adjudge, decide and decree, that the said James Thompson, at the time he executed the instrument, bearing date the eighth day of January, in the year 1840, purporting to be his last will and testament, was not of sound mind, nor competent to execute a will, and that the said instrument was not duly executed as and for the last will and testament of the said James Thompson, deceased; and it is further adjudged, decreed and declared, and the surrogate aforesaid, by virtue of the power and authority aforesaid, doth adjudge, decree and declare, that the said instrument in writing is utterly null and void as or for the said last will and testament of the said James Thompson, deceased.

And the said surrogate doth further order and decree, that the probate of the said last will and testament heretofore granted and issued by and under the seal of the surrogate of the county of New York, and bearing date on the day of in the year one thousand eight hundred and fifty-four, be, and the same is hereby revoked, and that the costs of all the parties to this proceeding, and the fees and expenses thereof, be paid out of the estate of the said deceased.

In testimony whereof, the surrogate of the county of New York hath hereunto fixed his seal, &c.

No. 101. P. 595.

ORDER CONFIRMING PROBATE AND DISMISSING ALLEGATIONS.

[As in last form to the [*] and then proceed:] doth order, adjudge and decree, that the said last will and testament of James Thompson, deceased, and the probate thereof be,

- writing, declare the said paper-writing to be the last will and testament of him, the said J. M.
- Fourthly.* They allege that the attesting witnesses to said alleged will did not, nor did either of them sign his name as a witness at the end of said alleged will, at the request of the said J. M.
- Fifthly.* They allege that the said paper-writing, purporting to be such last will and testament, was obtained, and the execution thereof by said J. M., procured by fraud and circumvention, and undue influence practiced against and upon the said J. M., by R. J., M. J., I. J. and G. J., or some or one or them, or some other person or persons unknown to the subscribers.
- Sixthly.* They allege that the said paper-writing was not freely and voluntarily executed or made as his last will and testament, by said J. M., deceased, but that the subscription thereto and publication thereof by him, the said J. M., was procured by fraud and coercion exercised upon him, the said J. M., deceased, by the said R., M., I. and G., or some one of them, or some other person or persons to the subscribers unknown.
- Seventhly.* They allege that the said paper-writing was not duly and sufficiently proved before the said James Campbell, as such surrogate, when so admitted to probate as aforesaid, and that the proofs taken at the said Surrogate's Court, on such admission thereof to probate, did not and do not show or establish that the said J. M., deceased, was of sound mind or memory when the same alleged will was made, or that he was free from restraint when he made the same, or that the same alleged will was subscribed by the said J. M., or declared by him to be his last will and testament, in the manner required by the statute in that behalf, or that the same was duly attested, as required by said statute.

City and County of New York, ss.—J. A., one of the subscribers to the foregoing allegations, being duly sworn, saith, that he has good reason, from circumstances, to believe, and that he does verily believe, the matters stated and alleged in the preceding document to be true, and that the same document was subscribed by him, this deponent, and his wife H., who is one of the next of kin of the above named J. M., deceased.

J. A.

Sworn this 20th day of October, 1840, {
before me,

W. H. B., *Commissioner of Deeds.*

No. 99. P. 594.

ORDER FOR ISSUING CITATION ON ALLEGATIONS.

At, &c. (See No. 3.)

IN THE MATTER OF THE ALLEGATIONS AGAINST
THE PROBATE OF THE WILL
OF
JAMES THOMPSON, DECEASED.

On reading and filing the allegations of Henry Thompson, one of the next of kin to James Thompson, late of the city of New York, deceased, against the validity of the last will and testament of the said James Thompson, deceased, and the competency of the proof thereof, and on motion of Mr. R. P., of counsel for the said Henry Thompson, it is ordered that a citation issue to Philip Thompson, the executor, who has taken upon himself the execution of the said last will and testament, and to Cornelia Thompson, William Thompson, Charles Thompson, and the Orphan Asylum Society of the city of New York, legatees named in the said last will and testament, residing in the state of New York, requiring them, and each of them, to appear in this court on the first day of September next, at ten o'clock in the forenoon of that day, to show cause why the probate of the said last will and testament should not be revoked.

CITATION ON ALLEGATIONS.

The People of the State of New York, to Philip Thompson, one of the executors who has taken upon himself the execution of the last will and testament of James Thompson, late of the city of New York, deceased, and to Cornelia Thompson, William Thompson, Charles Thompson, and the Orphan Asylum Society of the city of New York, legatees named in the said last will and testament, residing in the state of New York, send greeting:

ORDER REVOKING PROBATE.

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You and each of you, are hereby cited and required to appear before the surrogate of the county of New York, at his office in the city of New York, on the first day of September next, at ten o'clock in the forenoon of that day, to show cause why the probate of the said last will and testament of James Thompson, deceased, should not be revoked.

In testimony whereof, we have caused, &c.

(The forms for the examination of witnesses are similar to those on proving wills. See Appendix, p. .)

No. 100. P. 595.

ORDER REVOKING PROBATE.

At, &c. (See No. 3.)

IN THE MATTER OF THE ALLEGATIONS OF HENRY THOMPSON, AGAINST THE VALIDITY OF THE WILL OF JAMES THOMPSON, DECEASED, AND THE COMPETENCY OF THE PROOF THEREOF.

This matter having come on to be heard on the allegations of Henry Thompson, one of the next of kin to James Thompson, late of the city of New York, deceased, against the validity of the last will and testament of the said James Thompson, deceased, and against the competency of the proof thereof, and on the return of the citation heretofore issued therein, requiring Philip Thompson, the executor who has taken upon himself the execution of the said last will and testament, and Cornelia Thompson, William Thompson, Charles Thompson and the Orphan Asylum Society of the city of New York, legatees named in the said last will and testament, residing in the state of New York, to appear in this court on the day of last past, to show cause why the probate of the said last will and testament of James Thompson, deceased, should not be revoked, and due proof of the personal service of the said citation on all the persons and parties named therein having been produced and filed, and Henry Thompson, one of the next of kin of the said James Thompson, deceased, and who filed the allegations herein, having appeared by R. P., their proctor and counsel, in support of the said allegations, and the said Philip Thompson, the executor as aforesaid, and the said William Thompson, having appeared by C. C., his proctor and counsel, in opposition thereto, and the said, the Orphan Asylum Society of the city of New York, having appeared by A. D., their proctor and counsel, also in opposition thereto, and I. H., the special guardian of Charles Thompson, one of the said legatees, a minor, having duly appeared in behalf of the said minor, and no other person or party having appeared in the said matter, and the said matter having been heard on several days, and duly adjourned to this day, and upon hearing the proofs of the parties aforesaid, and counsel for them respectively, and due deliberation being thereupon had, it is adjudged, decided and decreed, and the surrogate of the county of New York, by virtue of the power and authority in him vested, [*] doth adjudge, decide and decree, that the said James Thompson, at the time he executed the instrument, bearing date the eighth day of January, in the year 1840, purporting to be his last will and testament, was not of sound mind, nor competent to execute a will, and that the said instrument was not duly executed as and for the last will and testament of the said James Thompson, deceased; and it is further adjudged, decreed and declared, and the surrogate aforesaid, by virtue of the power and authority aforesaid, doth adjudge, decree and declare, that the said instrument in writing is utterly null and void as or for the said last will and testament of the said James Thompson, deceased.

And the said surrogate doth further order and decree, that the probate of the said last will and testament heretofore granted and issued by and under the seal of the surrogate of the county of New York, and bearing date on the day of in the year one thousand eight hundred and fifty-four, be, and the same is hereby revoked, and that the costs of all the parties to this proceeding, and the fees and expenses thereof, be paid out of the estate of the said deceased.

In testimony whereof, the surrogate of the county of New York hath hereunto fixed his seal, &c.

No. 101. P. 595.

ORDER CONFIRMING PROBATE AND DISMISSING ALLEGATIONS.

[As in last form to the [*] and then proceed:] doth order, adjudge and decree, that the said last will and testament of James Thompson, deceased, and the probate thereof be,

No. 104. P. 597.

ORDER FOR CITATION ON THE ABOVE PETITION.

At, &c. (See No. 3.)

IN THE MATTER OF THE COMPLAINT OF H.
T., AGAINST P. T., THE EXECUTOR, &c.,
OF
JAMES THOMPSON, DECEASED.

On reading and filing the complaint in writing of H. T., a legatee under the last will and testament of James Thompson, late of the city of New York, deceased, and interested in the estate of the said deceased, it is ordered, pursuant to the prayer of the said petition, that a citation issue to P. T., the executor of the last will and testament of the said J. T., deceased, requiring him to appear in this court, on the day of instant, at ten o'clock in the forenoon of that day, to show cause why he should not be superseded as such executor.

CITATION.

The people of the state of New York, to P. T., the executor of the last will and testament of J. T., late of the city of New York, deceased, send greeting:

You are hereby cited and required personally to be and appear before our surrogate of the county of New York, at his office in the city of New York, on the day of instant, at ten o'clock in the forenoon of that day, then and there to show cause why you should not be superseded as such executor.

In testimony whereof, we have caused, &c.

No. 105. P. 597, 601.

ORDER ENJOINING EXECUTOR.

*Title. (See No. 104.)**At, &c. (See No. 3.)*

H. T., of the city of New York, a legatee under the last will and testament of J. T., late of said city, deceased, and interested in the estate of the said deceased, having made his complaint in writing to the surrogate of the county of New York, that the circumstances of P. T., the executor of the said last will and testament of the said deceased, are so precarious as not to afford adequate security for his due administration of the estate of the said deceased; and the said surrogate having thereupon issued a citation to the said P. T., requiring him to appear before the said surrogate, at a day and place therein specified, to show cause why he should not be superseded as such executor, it is thereupon ordered, and the surrogate of the county of New York, by virtue of the power in him vested by the statute in such case made and provided, doth order, that the said P. T. be, and he hereby is enjoined from further acting in the premises, until the matter in controversy shall be disposed of.

No. 106. P. 599.

ORDER REQUIRING SECURITY.

*Title. (See No. 104.)**At, &c. (See No. 3.)*

On reading and filing due proof, by affidavit of the due and personal service on P. T., the executor of the last will and testament of J. T., late of the city of New York, deceased, of the citation heretofore issued in this matter, in due form of law, requiring him to appear in this court, on this day, to show cause why he should not be superseded as such executor; and the said P. T. having appeared, and H. T., the complainant herein, having also appeared, and after hearing the proofs and allegations of the parties, and it appearing that the circumstances of the said P. T., executor as aforesaid, are so precarious as not to afford adequate security for his due administration of the estate, it is ordered, and the surrogate of the county of New York, pursuant to the statute in such case made and provided, doth order and require, that the said P. T. give bond, with sureties, like those required by law of administrators, within four days from this day, or, in default thereof, that his letters testamentary be superseded.

No. 107. P. 600.

DECREE SUPERSEDING LETTERS FOR NOT GIVING SECURITY.

Title. (See No. 104.)

At, &c. (See No. 3.)

Letters testamentary of the last will and testament of I. T., late of the city of New York, deceased, having heretofore been granted and issued by the surrogate of the county of New York, to P. T., sole executor in the said will named; and H. T., of the city of New York, a legatee under the said last will and testament, and interested in the estate of the said deceased, having made his complaint to the said surrogate that the circumstances of the said P. T. are so precarious as not to afford adequate security for his due administration of the said estate; and the surrogate having thereupon issued a citation in due form of law, to the said P. T., executor as aforesaid, requiring him to show cause on the day of now past, why he should not be superseded as such executor; and due proof of the service of the said citation having been filed with the said surrogate, and the said P. T. and the said H. T. having appeared on the said day, and after hearing the proofs and allegations of the parties, and it having appeared that the circumstances of the said P. T., executor as aforesaid, are precarious as aforesaid, and the surrogate having thereupon, pursuant to the statute in such case made and provided, ordered and required the said P. T. to give bond, with sureties like those required by law of administrators, within four days from the said day, and the said P. T. having neglected to give such bond so required, it is ordered and decreed, and the surrogate of the county of New York, pursuant to the statute in such case made and provided, doth order and decree, that the letters testamentary of the last will and testament of I. T., late of the city of New York, deceased, heretofore granted and issued by the said surrogate to P. T., sole executor in the said will named, and bearing date on the day of in the year one thousand eight hundred and fifty- be and the same hereby are superseded: And all authority and rights of the said P. T., as such executor aforesaid, are hereupon to cease.

No. 108. P. 601.

PETITION TO COMPEL AN ADMINISTRATOR, ONE OF WHOSE SURETIES HAS REMOVED FROM THE STATE, TO GIVE FURTHER SECURITY.

County of New York, }
Surrogate's Court. }

To A. W. B., Surrogate of the County of New York:

The petition of G. M., of the city of New York, respectfully sheweth, that your petitioner is one of the children and next of kin of B. M., late of the city of New York, deceased, intestate, and interested in the estate of the said deceased. That letters of administration of all and singular the goods, chattels and credits of the said B. M., deceased, were granted and issued by the surrogate of the county of New York, to A. L., of the city of New York, on the day of in the year one thousand eight hundred and fifty-

Your petitioner further shows that C. R., lately a resident of the city of New York, but now a resident, as your petitioner is informed and believes, of the city of Detroit, in the state of Michigan, is one of the sureties of the said A. L. in his bond given by him on the granting of the said letters, and that the said C. R. has removed out of the state of New York, as your petitioner is informed and believes; has gone to Detroit, in the state of Michigan aforesaid. That E. N., of the city of New York, is the only other security of the said administrator in his said bond.

In consideration of the premises, your petitioner applies to the surrogate for relief, pursuant to the statute in such case made and provided. And your petitioner will ever pray..

Dated this day of A. D. 1855.

The usual jurat.

No. 109. P. 601.

ORDER FOR CITATION ON THE ABOVE PETITION.

At, &c. (See No. 3.)

IN THE MATTER OF THE SURETIES OF A. L.
AS THE ADMINISTRATOR, &c.,
OF
B. M., DECEASED.

On reading and filing the petition under oath of G. M., one of the children and next of kin of B. M., late of the city of New York, deceased, and interested in his estate, setting forth that C. R., one of the sureties of A. L., the administrator of all and singular the goods, chattels and credits of the said B. M., deceased, has removed out of the state of New York, and the surrogate having received satisfactory evidence that the matter requires investigation, it is ordered that a citation issue to the said A. L., administrator as aforesaid, requiring him to appear in this court on the _____ day of _____ instant, at ten o'clock in the forenoon, to show cause why he should not give further sureties as such administrator, or be superseded in his administration.

CITATION ON THE ABOVE ORDER.

The People of the State of New York, to A. L., the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, send greeting:

You are hereby cited and required personally to be and appear before our surrogate of the county of New York, at his office in the city of New York, on the _____ day of _____ instant, at ten o'clock in the forenoon of that day, then and there to show cause why you should not give further sureties as such administrator, or be superseded in your administration.

In testimony whereof, we have caused, &c.

No. 110. P. 601.

ORDER THAT ADMINISTRATOR GIVE FURTHER SURETIES.

*Title. (See No. 109.)**At, &c. (See No. 3.)*

The citation heretofore issued in this matter on the application of G. M., one of the children and next of kin of B. M., late of the city of New York, deceased, and interested in his estate, requiring A. L., the administrator of all and singular the goods, chattels and credits of the said deceased, to appear in this court on this day, to show cause why he should not give further sureties as such administrator, or be superseded in his administration, having been returned, and the said A. L. and the said G. M. having appeared, and after hearing the proofs and allegations of the parties, and it appearing that the sureties of the said A. L., as such administrator aforesaid, are insufficient, and that C. R., one of the said sureties, has removed out of this state: It is ordered, and the surrogate of the county of New York, pursuant to the statute in such case made and provided, doth order that the said A. L. give further sureties in the usual form as such administrator aforesaid, within five days from this day, or in default thereof that his letters of administration be revoked.

No. 111. P. 601.

ORDER REVOKING LETTERS OF ADMINISTRATION.

*Title. (See No. 109.)**At, &c. (See No. 3.)*

Letters of administration of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, having heretofore been granted and issued by the surrogate of the county of New York, to A. L., of the city of New York, and G. M., one of the next of kin of the said B. M. deceased, and interested in his estate, having represented to the surrogate that C. R., one of the sureties of the said A. L., in his bond given by him on the granting of the said letters, has removed out of the state of New York, and the surrogate having received satisfactory evidence that the matter required investigation, and having

thereupon issued a citation in due form of law to the said A. L., administrator as aforesaid, requiring him to show cause on the day of now past, why he should not give further sureties as such administrator, or be superseded in his administration, and the said A. L. and the said G. M. having appeared on the return of the said citation, and it appearing that the sureties of the said A. L., as such administrator aforesaid, are insufficient, and that C. R., one of the said sureties, has removed out of this state, and the surrogate, pursuant to the statute in such case made and provided, having thereupon made an order requiring the said A. L. to give further sureties in the usual form as such administrator aforesaid, within five days from the said day, and the said A. L. having neglected to give further sureties to the satisfaction of the surrogate within the time so prescribed; it is ordered, and the surrogate of the county of New York, pursuant to the statute in such case made and provided, doth order, that the letters of administration of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, heretofore granted and issued by the said surrogate, bearing date on the day of in the year one thousand eight hundred and fifty- be, and the same hereby are revoked: And all authority and rights of the said A. L., as such administrator aforesaid, are hereupon to cease.

No. 112. P. 601.

APPLICATION OF A SURETY TO BE RELEASED FROM FURTHER RESPONSIBILITY.

*County of New York, }
Surrogate's Court. }*

To A. W. B., Surrogate of the county of New York:

The application of E. N., of the county of New York, respectfully sheweth, that he is one of the sureties of A. L., as the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, and that he desires to be released from responsibility, on account of the future acts or defaults of the said administrator. He therefore applies to the surrogate for relief, pursuant to the statute in such case made and provided.

Dated this day of 1854. E. N.

No. 113. P. 602.

ORDER FOR ISSUING CITATION ON THE ABOVE PETITION.

At, &c. (See No. 3.)

IN THE MATTER OF THE SURETIES OF A. L., AS
THE ADMINISTRATOR, &C.,
OF
B. M., DECEASED.

On reading and filing the application of E. N., one of the sureties of A. L., as the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, praying for relief, it is ordered that a citation issue to the said A. L., administrator as aforesaid, requiring him to appear in this court on the day of at ten o'clock in the forenoon of that day, then and there to give new sureties in the usual form for the faithful discharge of his duties as such administrator.

(The citation will require the administrator to appear according to the order.)

No. 114. P. 602.

ORDER RELEASING SURETY.

Title. (See No. 113.)

At, &c. (See No. 3.)

E. N., of the city of New York, one of the sureties of A. L., as the administrator of all and singular the goods, chattels and credits of B. M., late of the city of New York, deceased, having heretofore presented his application to the surrogate, setting forth that he desired to be released from responsibility on account of the future acts or defaults of the said admin-

istrator, and praying for relief, pursuant to the statute in such case made and provided; and the surrogate having thereupon issued a citation requiring the said A. L., administrator as aforesaid, to appear before him and give new sureties; and the said A. L. having appeared in compliance with the said citation, and having given new sureties to the satisfaction of the surrogate; it is ordered, and the surrogate of the county of New York, pursuant to the statute aforesaid, doth order and declare, that the said E. N. shall not be liable on the bond bearing date on the day of in the year one thousand eight hundred and fifty- executed to the people of the state of New York, by the said A. L. and C. R., and the said E. N. as sureties on the granting of the letters of administration of all and singular the goods, chattels and credits of the said B. M., deceased, to the said A. L. by the said surrogate, for any future act, default or misconduct of the said administrator.

No. 115. P. 602.

ORDER THAT ADMINISTRATOR GIVE NEW SURETIES.

This order will be similar in form to No. 110.

The order revoking the letters in case new sureties be not given, will be similar in form to No. 111.

No. 116. P. 624.

PROCEEDINGS ON APPOINTMENT OF A GUARDIAN OF A MINOR OF THE AGE OF FOURTEEN YEARS.

PETITION.

To A. W. B., Surrogate of the county of New York:—

The petition of A. M. C., of the city of New York, respectfully sheweth, that your petitioner is a resident of the county of New York, and is a minor over fourteen years of age, and was seventeen years of age on the sixth day of May last past; that your petitioner is entitled to certain property and estate, and that, to protect and preserve the legal rights of your petitioner, it is necessary that some proper person should be duly appointed the guardian of his person and estates during his minority. Your petitioner therefore nominates, subject to the approbation of the surrogate, B. D., of the city of New York, merchant, to be such guardian, and prays his appointment accordingly, pursuant to the statute in such case made and provided. And your petitioner will ever pray.

Dated New York, the first day of October, A. D. 1854.

A. M. C.

CONSENT.

I, B. D., of the city of New York, merchant, do hereby consent to be appointed the guardian of the person and estate of the above named minor during his minority.

Dated this first day of October, A. D. 1854.

B. D.

AFFIDAVIT AS TO PROPERTY.

County of New York, ss.—J. P., of the city of New York, being duly sworn, doth depose and say, that he is acquainted with the property and estate of the above named minor, and that the same consists of real and personal estate; and that the personal estate of said minor does not exceed the sum of two thousand dollars, or thereabouts; and that the annual rents and profits of the real estate of said minor does not exceed the sum of three hundred dollars, or thereabouts.

J. P.

Sworn this first day of October, }
1854, before me, }
A. W. B., *Surrogate*.

GUARDIAN'S BOND.

Know all men by these presents, that we, B. D., of the city of New York, merchant, and L. R., of the same city, physician, are held and firmly bound unto A. M. C., of the city of

APPOINTMENT OF GUARDIANS.

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New York, a minor over fourteen years of age, in the sum of six thousand four hundred dollars, lawful money of the United States, to be paid to the said minor, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the day of one thousand eight hundred and

The condition of this obligation is such, that if the above bounden B. D., shall and will faithfully, in all things, discharge the duty of a guardian to the said minor, according to law, and render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof, when thereunto required, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of

B. D. [SEAL]
L. R. [SEAL.]

Proof or acknowledgment as in bonds of administrators. See *ante*, Appendix, p. 26.

AFFIDAVIT OF JUSTIFICATION OF SURETY.

City and County of New York, ss.—L. R., the within named surety, being duly sworn, doth depose and say, that he resides at No. street, in said city, and is worth the sum of six thousand four hundred dollars, over and above all his just debts and liabilities.

Sworn this day of }
185 , before me, }
A. W. B., *Surrogate*.

ORDER THAT THE LETTERS OF GUARDIANSHIP ISSUE.

At, &c. (See No. 3.)

<p style="text-align: center;">IN THE MATTER OF THE GUARDIANSHIP OF A. M. C., A MINOR OF THE AGE OF FOURTEEN YEARS.</p>

On reading and filing the petition of A. M. C., a minor, residing in the city of New York, of the age of fourteen years, nominating B. D., of the city of New York, merchant, to be the guardian of his person and estates, and praying his appointment as such guardian, and on reading and filing the bond, executed in due form of law to the said minor, by the said B. D., with sufficient security, it is ordered, that letters of guardianship of the person and estate of the said minor issue to the said B. D., and that he be appointed such guardian aforesaid, according to the prayer of the said petition.

LETTERS OF GUARDIANSHIP.

The People of the State of New York, to B. D., of the city of New York, send greeting:

Whereas an application, in due form of law, has been made to our surrogate of the county of New York, to have you, the said B. D., appointed the guardian of the person and estates of A. M. C., a minor, residing in the city of New York, of the age of fourteen years: And whereas the said B. D. has agreed and consented to become such guardian, and has duly executed and delivered a bond, pursuant to law, for the faithful discharge of his duty as such guardian, and we being satisfied of the sufficiency of said bond, and that said B. D. is a good and reputable person, and is in every respect competent to have the custody of the person and estate of said minor, do by these presents allow, constitute and appoint you, the said B. D., the general guardian of the person and estate of said minor during his minority, hereby requiring you, the said guardian, to safely keep the real and personal estate of said minor, which shall hereafter come to your custody, and not suffer any waste, sale or destruction of the same, but to keep up and sustain his lands, tenements and hereditaments, by and with the rents, issues and profits thereof, or with such other moneys belonging to him as shall come to your possession, and to deliver the same to him when he becomes of full age, or to such other guardian as may be hereafter appointed, in as good order and condition as you receive the same; and, also, to render a just and true account of all moneys

and property secured by you, and the application thereof, and of your guardianship in all respects, to any court having cognizance thereof, when thereunto required.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, A. W. B., surrogate of said county, at the city of New York, the day of in the year one thousand eight hundred and and of our independence the

A. W. B., *Surrogate*

Annexed to the Letters is the following:

Extract from an act of the Legislature of New York, concerning executors, administrators, guardians, wards, &c., passed May 16th, 1837.

§ "Every general guardian appointed by the surrogate, shall annually after such appointment, so long as any part of the estate, or the income, or proceeds thereof, remain in his hands or under his control, file in the office of the surrogate appointing him, an inventory and account under oath of his guardianship, and of the amount of property received by him, and remaining in his hands, or invested by him, and the manner and nature of such investment, and his receipts and expenditures in form of debtor and creditor."(y)

No. 117. P. 628.

PROCEEDINGS FOR THE APPOINTMENT OF A GUARDIAN OF A MINOR UNDER THE AGE OF FOURTEEN.

PETITION.

To the Surrogate of the County of New York:

The petition of I. F., of the city of New York, merchant, respectfully sheweth, that your petitioner is a paternal uncle of C. F., a minor; that said minor is a resident of the county of New York, and is under fourteen years of age: That said C. F., was six years of age on the tenth day of July last past: That the only relatives of said minor residing in the county of New York, are W. G., his maternal grandfather, A. G., and H. G., his maternal uncles, and D. F., R. F., and your petitioner, his paternal uncles: That said minor is entitled to personal property to the value of about one thousand dollars, as your petitioner is informed and verily believes, and that he is also seised of certain real estate, the annual rents and profits whereof do not exceed the sum of two hundred dollars: And that to protect and preserve the legal rights of said minor, it is necessary that some proper person should be duly appointed the guardian of his person and estate.

Your petitioner, therefore, prays that you will appoint him, your petitioner, the guardian of the person and estate of the said minor, until he shall arrive at the age of fourteen years, and until another guardian shall be appointed. And your petitioner will ever pray.(s)

Dated this day of A. D. 185 I. F.

City and County of New York, ss.—I. F., of the city of New York, the above petitioner, being duly sworn, deposes and says, that the matters set forth in the foregoing petition are true, as he is informed and verily believes.

Sworn before me, this, day } I. F.
of 185 . }

CONSENT.

I, I. F., of the city of New York, merchant, do hereby consent to become the guardian of the above mentioned minor, pursuant to the prayer of the foregoing petition. I. F.

(y) See B. L. 1837, 584, secs. 57, 58; 2 R. S. (4th ed.) 383; *Ante*, p. 624.

(s) Where there are several minors of the same family, under the age of fourteen, for whom guardianship is necessary, and the same person desires to be appointed the guardian for them all, the application for such appointment may be included in a single petition.

APPOINTMENT OF GUARDIANS.

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ORDER ASSIGNING A DAY FOR THE HEARING OF THE APPLICATION, AND DIRECTING AS TO THE SERVICE OF NOTICE ON THE RELATIVES OF THE MINOR.

At, &c. (See No. 3.)

IN THE MATTER OF THE GUARDIANSHIP
OF
C. F., A MINOR UNDER THE AGE OF FOUR-
TEEN YEARS

I. F., of the city of New York, merchant, a paternal uncle of C. F., a minor, residing in the county of New York, under the age of fourteen years, having applied to the surrogate to be appointed the guardian of the person and estate of the said minor, until he shall arrive at the age of fourteen years, and until another guardian shall be appointed, and it appearing that there are other relatives of the said minor residing in the county of New York, the surrogate hereby assigns Monday, the day of instant, at ten o'clock in the forenoon, for the hearing of the said application, at the surrogate's office in the city of New York; and he hereby orders and directs notice of such hearing to be given to A. G. and H. G., residing in the county of New York, maternal uncles of the said minor, and to D. F. and R. F., residing in the same county, paternal uncles of the said minor, at least six days before the day of the said hearing.

NOTICE OF HEARING.

Surrogate's Court—County of New York:

IN THE MATTER OF THE GUARDIANSHIP
OF
C. F., A MINOR UNDER THE AGE OF FOUR-
TEEN YEARS.

Sir,—Take notice, that I. F., of the city of New York, merchant, a paternal uncle of C. F., a minor, residing in the county of New York, under the age of fourteen years, has applied to the surrogate of the county of New York, to be appointed the guardian of the person and estate of the said minor, until he shall arrive at the age of fourteen years, and until another guardian shall be appointed, and that the said surrogate has assigned Monday, the day of instant, at ten o'clock in the forenoon, for the hearing of the said application before him, at the surrogate's office in the city of New York.

Dated this day of A. D. 185 .

Yours, &c.,

I. F.

To A. G., &c.

The form of the bond will be the same as that at No. 116, with the proper alteration as to the age of the minor.

The form of the order for issuing the Letters will be similar to that in the case of a minor under the age of fourteen years. (See No. 116.)

The form of the letters of guardianship will be similar to that given at No. 116, except that instead of the minor being stated to be "*of the age of fourteen years*," it should be *under the age of fourteen years*: And instead of the appointment as "*the general guardian of said minor during his minority*," it should be, *until he shall arrive at the age of fourteen years, and until another guardian shall be appointed*.

FORM OF AN ANNUAL INVENTORY AND ACCOUNT CURRENT TO BE RENDERED BY A GUARDIAN, PURSUANT TO THE 57TH SECTION OF THE LAW OF 1837.—S. L. 1837, 534. 2 R. S. (4th ed.) 338. (See p. 634.)

Surrogate's Court—County of Albany.

IN THE MATTER OF A. B., A MINOR.

INVENTORY.

A just and true inventory of the real and personal estate and effects of the above named minor, on the 31st of December, 1842.

1842.	
Dec. 31. By balance of cash on hand this day,.....	\$816 74
Robert Gray's bond and mortgage on real estate, which is well secured, with interest at 7 per cent. from 31st December, 1842,.....	350 00
Two hundred and forty shares of stock in the Mohawk Bank, worth at par value,.....	1,200 00
Two shares Albany and Bern Turnpike stock, par value \$1,000, but actually worth only about.....	300 00
A bond of G. Lord and mortgage for \$800 on unincumbered real estate, which is well secured, with interest at 7 per cent. Int. due from 7th March, 1842,.....	800 00
S. Drake's bond and mortgage for \$910, on unincumbered real estate, with interest at 7 per cent. Int. due from 27th July, 1842,.....	910 00
J. Field's bond and mortgage for \$700, well secured on unincumbered real estate, with interest at 7 per cent. Interest due from 19th August, 1842,.....	700 00
Balance of a legacy left to infant by John Miller, deceased,.....	250 00
A cultivated farm in the town of Charlton, in the county of Saratoga, containing 110 acres, in good repair, under a lease for one year, from 1st May, 1842, at an annual rent of \$70, worth about.....	1,300 00
A dwelling-house and lot of ground on Genesee street, in the city of Utica, dimensions of lot, 200 feet in depth and 28 feet in width, under a lease for one year from 1st May, 1842, at an annual rent of \$180, payable quarter-yearly, worth about.....	3,000 00

Estimated value of real and personal estate,..... \$8,726 74

J. K., *Guardian.*

ACCOUNT CURRENT.

The estate of A. B., a Minor,

To J. K., *Guardian.*

		Dr.
1852.		
May 2.	To cash paid M. Low's bill for board and lodging, &c.....	\$37 33
June 4.	Dr. Jones' bill for medical attendance,.....	9 17
July 9.	I. Fox's bill for tuition,.....	13 21
July 15.	P. Storm in full for mortgage on farm,.....	5,000 00
Aug. 19.	Cash loaned on mortgage to A. B.,.....	839 08
Aug. 11.	S. Marks' bill, books and stationery,.....	17 36
Sept. 17.	Collector, for taxes on dwelling-house and lot in Utica,.....	19 21
" 29.	G. Bull's bill for repairing dwelling-house in Utica,.....	43 19
Oct. 12.	S. Rider, repairing barn in town of Charlton,.....	62 40
" 20.	Postage on letter from A. B.,.....	25
Nov. 6.	D. Gray's bill for merchandise,.....	33 29
" 18.	Wm. Lott's bill for board and lodging,.....	46 67
Nov. 21.	S. Newland's bill for lumber, used in repairing house and barn,.....	15 44
Dec. 31.	Loaned Robert Gay, on his bond and mortgage on farm,.....	350 00
" "	Commissions for receiving moneys since last annual account, exclusive of capital received from previous investments, 2 1-2 per cent. on.....	25 00
	1 1-4 per cent. on.....	50 00
	1-2 " " ".....	1,553 98
	Carried forward,	\$6,539 38

GUARDIAN'S INVENTORY AND ACCOUNT.

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	Brought forward.....	\$6,539	38
Dec. 31.	Commissions for moneys paid out, exclusive of investments and re-investments.		
	2 1-2 per cent. on.....	\$1,000	50 00
	1 1 4 " " ".....	4,000	25 00
	1-2 " " ".....	637 4	3 18
" "	Balance due the estate.....		16 74
		\$6,634	30

1842.	Contra.	Cr.
Jan. 1.	Balance due as by last annual account.....	\$27 32
Feb. 2.	Cash received, one quarter's rent on dwelling-house in Utica.....	45 00
Mar. 7.	One year's interest on G. Lord's bond and mortgage.....	56 00
Apr. 15.	Dividend on Mohawk Bank stock.....	73 50
May 3.	One year's rent on farm in town of Charlton.....	59 00
" 8.	One quarter's rent on house in Utica.....	45 00
June 12.	L. Kerr's note, principal.....	\$73 00
	Int. 1 year, 3 months, 15 days.....	6 59
		79 59
July 27.	One year's interest on S. Drake's bond and mortgage.....	43 70
Aug. 4.	One quarter's rent on dwelling-house in Utica.....	45 00
" 19.	One year's interest on J. Field's bond and mortgage.....	42 00
" "	Cash for timber sold J. Peters.....	6,000 00
Sep. 27.	Part of the amount of legacy to infant by John Miller's will.....	50 00
Oct. 13.	Amount of G. Lord's note, given for balance of last year's interest on his mortgage, including interest on note.....	23 19
Nov. 13.	One quarter's rent on house in Utica.....	45 00
		\$6,634 30

Albany, Dec. 31st, 1842.

J. K., Guardian.

Albany County, ss.—J. K., the guardian of the above named minor, being duly sworn, doth depose and say, that the above is a just and true inventory of the whole real and personal estate and effects of the above named minor, so far as the same have come to his knowledge, and a just and true account of his guardianship, and of the amount of property received by and remaining in his hands, or invested by him on account of the said minor, and of the manner and nature of such investment, and also of his expenditures on account of the said minor and his estate, since this deponent rendered his last account current, in this matter, to this court. [In the first account these last words in italics are to be left out.]

J. K.

Sworn to to this 1st day of January, }
1843, before me, }
L. M., Surrogate.

NOTE.—If the same person is guardian for two or more minors, there must be an inventory of the property of each; or the part thereof belonging to each, if it is joint property, must be stated. And the accounts of the receipts and expenditures on account of each minor, or of his estate, must be kept separately; and each is to be charged with his proportionate share for any services or expenditures for their joint benefit.

The following is a form of a deposition on proving a will adapted to two or more attesting witnesses. The writer was not aware that such were in use until the printing of this appendix had been nearly completed.

County of Saratoga, }
Surrogate's Court. }

IN THE MATTER OF PROVING THE LAST WILL
AND TESTAMENT
OF
J. R., DECEASED.

Saratoga County, ss. .

J. M. K. and J. D., both of the city of New York, being first duly sworn in open court, on their oaths do depose and say, that they are subscribing witnesses to the last will and tes-

tament of J. R., late of the town of _____, in the county of Saratoga, aforesaid, deceased. And these deponents further say, that the said deceased did, in the presence of these deponents, subscribe his name at the end of the instrument which is now shown to these deponents, and which purports to be the last will and testament of the said deceased, and which bears date on the _____ day of _____, in the year one thousand eight hundred and fifty-five; that the said deceased did, at the time of subscribing his name to said instrument as aforesaid, declare the same to be his last will and testament; that these deponents did thereupon subscribe their own names at the end of said instrument as attesting witnesses to the execution thereof, at the request of the said deceased, and in his presence, and in the presence of each other. That the said deceased, at the time of subscribing his name to said instrument as aforesaid, was upwards of twenty-one years of age; that he appeared to be of sound mind and memory, and was not under restraint to the knowledge or belief of these deponents.

J. M. R.
J. D.

Subscribed and sworn this 11th day of }
July, 1855, before me, }

JOHN. C. HULBUT, *Surrogate*.

AN ACT
RESPECTING THE FEES OF SURROGATES.

PASSED MAY 7, 1844.

(S. L. 1844, 445; 2 R. S. 4th ed. 829. See p. 606.)

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

Sec. 1. Section thirty-two of title three of chapter ten of part third of the Revised Statutes is hereby repealed.

Sec. 2. For the following services, hereafter done or performed by surrogates, the following fees shall be allowed, nor shall they be entitled to receive any other fees therefor:

Drawing proof of a will when contested, or any other proceeding before him, for which no specific compensation is provided, fifteen cents for every folio.

Drawing every petition in any proceeding before him, not otherwise provided for, including the affidavit of the truth of the facts stated therein, fifty cents.

Every certificate of the proof of a will, when contested, indorsed thereon, including the seal, fifty cents; and for any certificate upon exemplifications of records or papers filed in his office, or upon the papers transmitted upon appeal, including the seal, fifty cents.

Drawing, copying and approving of every bond required by law, fifty cents.

Drawing, copying and recording every necessary paper, and drawing and entering every necessary order, and for rendering every other service necessary to complete proceedings on the appointment of a general guardian of a minor, three dollars; and for the like services in appointing the same person guardian for any other minor of the same family, at the same time, one dollar and fifty cents.

Drawing, entering and filing a renunciation, in cases where the same may be made by law, twenty-five cents.

A citation or summons, in cases not otherwise provided for, to all parties in the same proceeding, residing in any one county, including the seal, fifty cents; and for a citation to all parties in any other county, twenty-five cents.

A subpoena for all witnesses in the same proceeding, residing in one county, including the seal, twenty-five cents.

For every copy of a citation and subpoena, furnished by a surrogate, twelve and a half cents, and every such copy of citation shall be signed by the surrogate.

A warrant of commitment or attachment, including the seal, fifty cents.

A discharge of any person committed, including the seal, fifty cents.

For drawing and taking every necessary affidavit, upon the return of an inventory, fifty cents.

For serving notice of any revocation, or other order or proceeding required by law to be served, twenty-five cents.

For swearing each witness, in cases where a gross sum is not allowed, twelve and one half cents.

For searching the records of his office for any one year, twelve and one-half cents; and for every additional year, six cents; but no more than twenty-five cents shall be charged or received for any one search.

Recording every will, with the proof thereof, letters testamentary, letters of administration, report of commissioners for the admeasurement of dower, and every other proceeding required by law to be recorded, including the certificate, if any, at the foot of the record, when the recording is not specifically provided for in this act, ten cents for every folio.

For the translation of any will from any other than the English language, ten cents for every folio.

Copies and exemplifications of any record, proceeding or order had or made before him, or

of any papers filed in his office, transmitted on an appeal, or furnished to any party on his request, six cents for every folio, to be paid by the person requesting them.

For making, drawing, entering and recording every order for the sale of real estate, and every final order or decree on the final settlement of accounts, one dollar and fifty cents; and for the confirmation of the sale of real estate, seventy-five cents; and for making, drawing, entering and recording any other order or decree, when the same is not otherwise provided for, twenty-five cents.

Hearing and determining, when the proof of a will, or the right to administration, or appointing a guardian, is contested, two dollars.

Taking, stating and determining upon an account rendered upon a final settlement, or determining and deciding the distribution of personal estate, if contested, two dollars for each day necessarily spent therein, not exceeding three days.

For hearing and determining any objections to the appointment of an executor or administrator, or any application for his removal, or for the removal of any guardian, or any application to annul the probate of a will, two dollars.

For hearing and determining upon an application to lease, mortgage or sell real estate, two dollars.

For drawing and recording all necessary papers, and drawing and entering all necessary orders on applications for letters of administration, when not contested, and for all services necessary to complete the appointment of administrators, and for the appointment of appraisers, five dollars; but in cases where a citation is necessary, seventy-five cents in addition.

For investing, for the benefit of any minor, any legacies, or the distributive shares of the estate of any deceased person, in the stocks of this state or of the United States, one per cent. for a sum not exceeding two hundred dollars; and for any excess, one-quarter of one per cent.; for investing the same on bond and mortgage of real estate, one-half of one per cent., for a sum not exceeding two hundred dollars, and one-quarter of one per cent. for any excess.

For receiving the interest on such investments, and paying over the same for the support and education of such minor, one-half of one per cent.

Appointing a guardian to defend any infant who shall be a party to any proceeding, fifty cents; but where there is more than one minor of the same family, and the same guardian is appointed for all, twenty-five cents for each additional minor; and no greater or other fee shall be charged for any service in relation to such appointment.

Hearing and determining upon the report of commissioners for the admeasurement of dower, one dollar.

For distributing any moneys brought into his office on the sale of real estate, two per cent.; but such commission shall not in any case exceed twenty dollars for distributing the whole money raised by such sale, and no executors or other persons, authorized to sell any real estate, by order of any surrogate, shall be allowed any commission for receiving or paying to the surrogate the proceeds of such sale; but shall be allowed their expenses in conducting such sale, including two dollars for every deed prepared and executed by them thereon, and a compensation not exceeding two dollars a day for the time necessarily occupied in such sale.

But no fee shall be taken by any surrogate, in any case, when it shall appear to him, by the oath of the party applying for letters testamentary or of administration, that the goods, chattels and credits do not exceed the value of fifty dollars, nor shall he take any fee for copying any paper drawn by him or filed in his office, except as above provided.

For drawing and recording all necessary petitions, depositions, affidavits, citations and other papers, and for drawing and entering all necessary orders and decrees, administering oaths, appointing guardians *ad litem*, and appointing appraisers, and for rendering every other necessary service, in cases of proof of will and issuing letters testamentary, when not contested, and the will does not exceed fifteen folios, surrogates shall receive twelve dollars; and where the will exceeds fifteen folios, ten cents per folio for recording such excess, and six cents per folio for the copy of such excess to be annexed to the letters testamentary.

For all fees, on filing the annual account of any guardian, when the surrogate shall draw and take the affidavit of the guardian, and for examining such accounts, fifty cents; but when the same shall not be drawn nor taken by him, he shall charge no fees.

No charge shall be made for drawing, copying or recording his bill of fees in any case. (2 R. S. 4th ed. 831.)

Sec. 3. The fee for filing any paper in the surrogate's office is abolished. (S. L. 1844, 448; 2 R. S. (4th ed.) 831.)

The remaining sections of this act will be found in the first chapter of this work—the same relating to the subjects of that chapter. (See p. 40.)

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[*] However, in *Boyd v. Davis*, mention of which is made in note (c), p. 304, the Supreme Court, at general term, in the third district, has, since the 208d page of the text was printed, finally decided otherwise. They have affirmed the sentence of the surrogate, stated in the note referred to, and approved the judgment of the court in *Thornton v. Winston*, 4 Leigh, 182.

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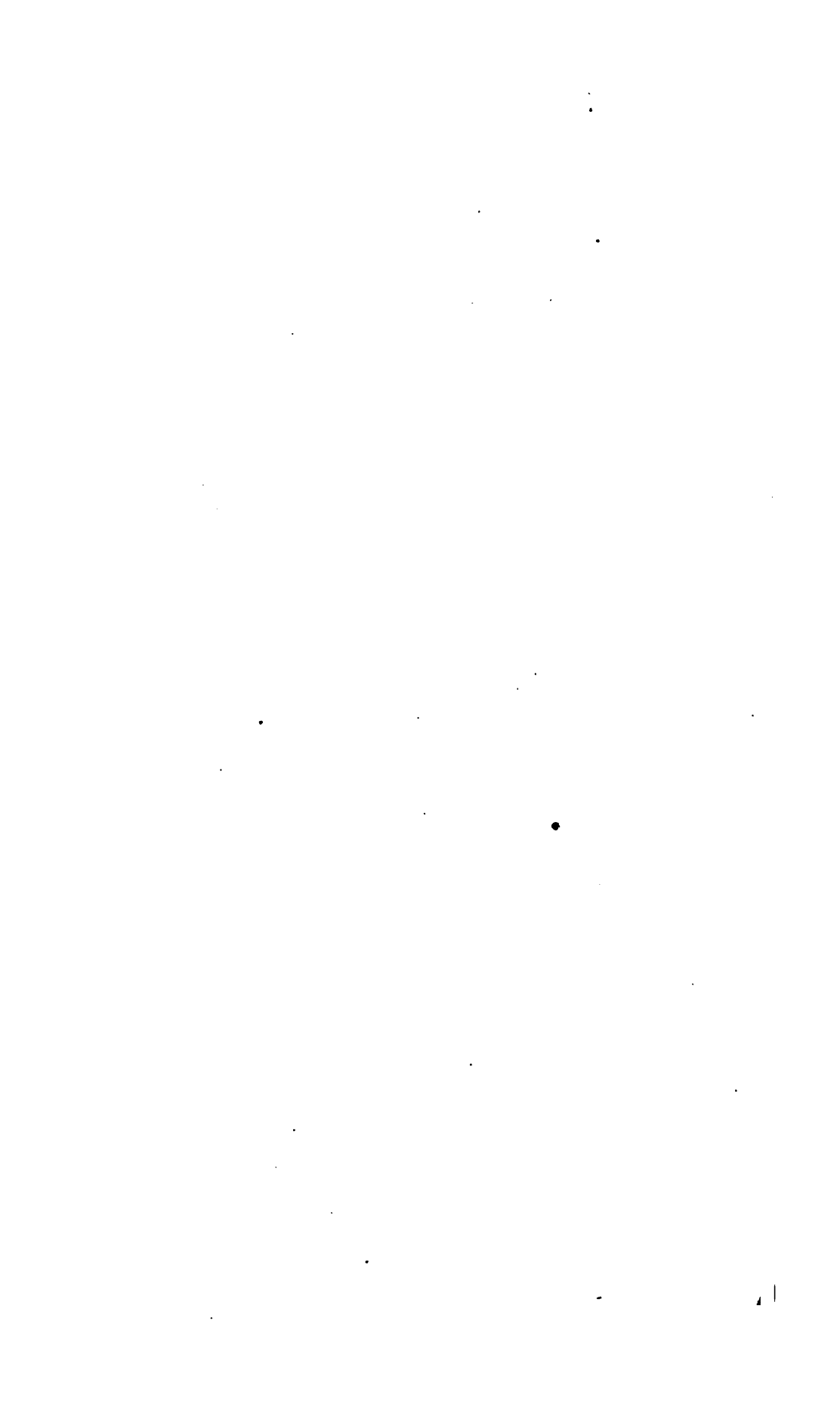
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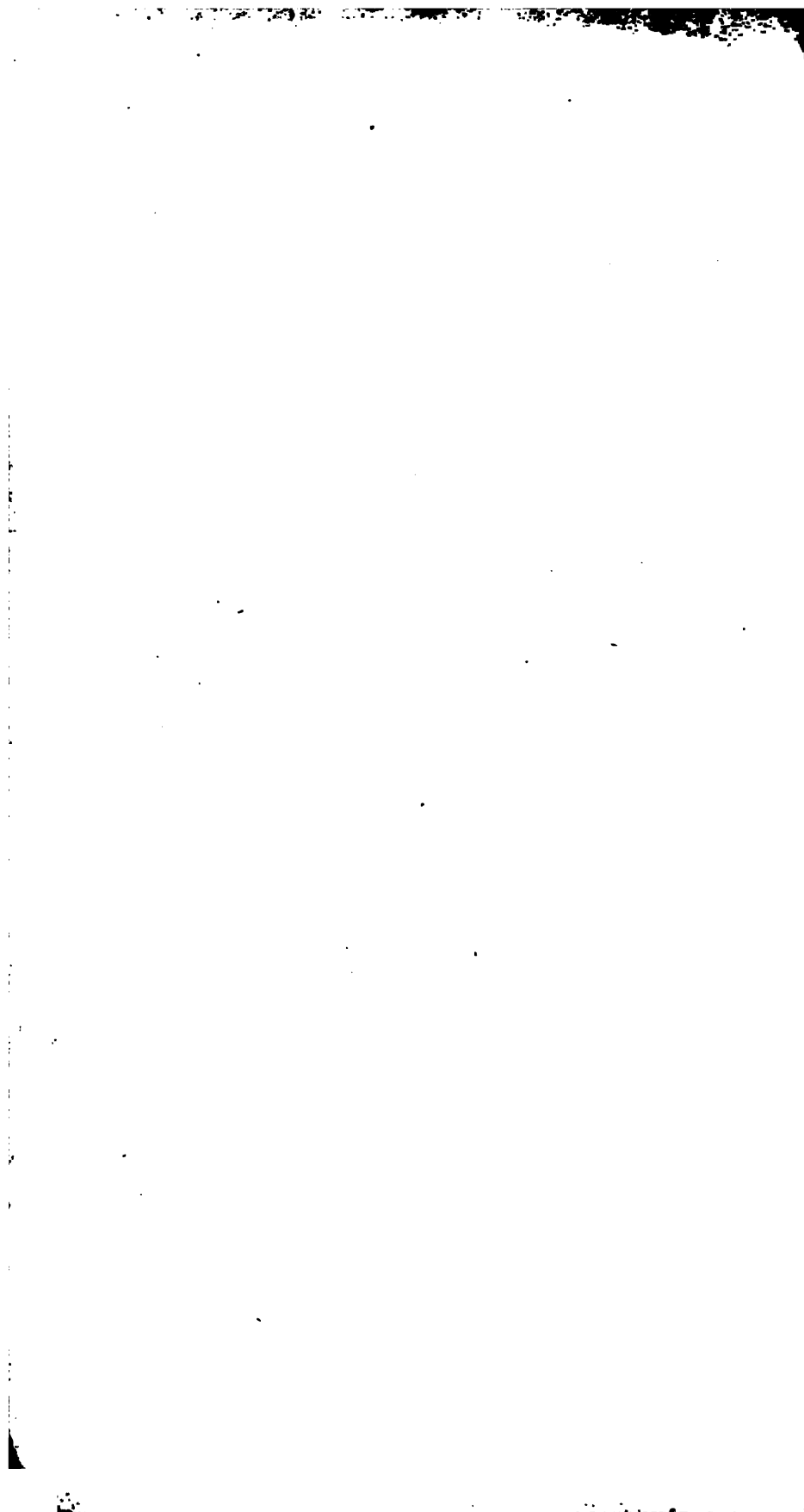
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